24TH FEDERAL LITIGATION COURSE

31 July -4 August 2006

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TWENTY-FOURTH FEDERAL LITIGATION COURSE
The Judge Advocate General's Legal Center and School, U.S. Army
Charlottesville, VA 22903-1781
From 31 July to 4 August 2006

CLASS TIME / PROFESSOR	ROOM	TEACHING DEPARTMENT/ SCHEDULE OF INSTRUCTION
		Monday, 31 July 2006
0800 – 0810 COL Block	144	OPENING EXERCISES. The Judge Advocate General's Legal Center and School, U.S. Army.
0810 – 0850 MAJ Birdsong	144	COURSE MANAGER ANNOUNCEMENTS: MAJ Jack Ohlweiler, Administrative and Civil Law Department.
0900 – 0950 LTC Steinbeck	144	INTRODUCTION TO FEDERAL LITIGATION PRACTICAL EXERCISE.
1010 – 1100 MAJ Birdsong	144	SERVICE LITIGATION OPERATIONS OVERVIEW AND UPDATE.
1110 – 1200 CPT Cote	144	CASE MANAGEMENT AND RESPONSIBILITY FOR CONDUCTING LITIGATION.
1200 – 1330		LUNCH
1210 – 1310 MAJ Birdsong/CPT Cote	144	Professional Responsibility Videotape (OPTIONAL). You may bring your lunch.
1330 - 1620 LTC Steinbeck/LTC Fetterman/Mr. Mickle	144	SYSTEMATIC ANALYSIS OF CASES IN FEDERAL LITIGATION.
1630 – 1720		RESEARCH AND STUDY.
		Tuesday, 1 August 2006
0800 – 0850 MAJ Young	144	REMOVAL OF CASES TO FEDERAL COURTS.
0900 – 1050 Mr. Brown	144	INDIVIDUAL LIABILITY OF FEDERAL OFFICIALS AND EMPLOYEES. Guest Speaker: Mr. Paul Brown, Torts Branch, Civil Division, Department of Justice.
1110 – 1200 LTC Steinbeck	144	PLEADINGS AND MOTIONS PRACTICE
1200 – 1330		LUNCH

1210 – 1310 MAJ Birdsong/CPT Cote	144	Professional Responsibility Videotape (OPTIONAL). You may bring your lunch.
1330 – 1420 LTC Steinbeck	144	PLEADINGS AND MOTION PRACTICE, continued.
1430 - 1720 ADA Faculty	144	PLEADINGS AND MOTION PRACTICE SEMINAR.

Wednesday, 2 August 2006

0800 – 0950 Mr. Ray	144	DISCOVERY THEORY & PRACTICE.
1010 – 1100 MAJ Young	144	DISCOVERY DEPOSITIONS
1110 – 1200 ADA Faculty	144	DISCOVERY SEMINAR
1200 – 1330		LUNCH
1330 – 1420 ADA Faculty	144	DISCOVERY SEMINAR, continued
1430 – 1520 Mr. Robinson/Ms. Murphy	144	FEDERAL APPELLATE PRACTICE / ORAL ADVOCACY. Guest Speakers: Mr. Robinson, Ms. Murphy, U.S DOJ, Civil Division, Appellate Staff.
1530 – 1620 LTC Bergen	144	TRO AND PRELIMINARY INJUNCTIONS & HANDOUT/EXPLAIN TRO PRACTICAL EXERCISE.
1630 – 1720		TRO PRACTICAL EXERCISE PREPARATION.

Thursday, 3 August 2006

0800 – 0950		TRO PRACTICAL EXERCISE PREPARATION.
1010 – 1100 ADA Faculty	144	TRO ARGUMENTS PRACTICAL EXERCISE (Section A).
1010 – 1100		RESEARCH AND STUDY (Section B).
1110 – 1200 ADA Faculty	144	TRO ARGUMENTS PRACTICAL EXERCISE (Section B).
1110 – 1200		RESEARCH AND STUDY (Section A).
1200 – 1330		LUNCH

1330 – 1400 ADA Faculty	144	TRO FEEDBACK.
1410 – 1500 Judge Connelly	144	MAGISTRATE'S ROLE IN FEDERAL CIVIL LITIGATION. Guest Speaker: Honorable William Connelly, U.S. Magistrate Judge, U.S. District Court for the District of Maryland.
1510 – 1600 LTC Bergen	144	ALTERNATIVE DISPUTE RESOLUTION IN FEDERAL PRACTICE.
1610 – 1700 ADA Faculty	144	ADR MEDIATION SETTLEMENT DEMONSTRATION.

Friday, 4 August 2006

0800 – 0850 CPT Cote	144	PRE-TRIAL PREPARATION
0840 – 1010 LTC Steinbeck	144	FEDERAL RULES OF EVIDENCE
1010 – 1130 TBD	144	FEDERAL LITIGATION: A Judge's Perspective. Guest Speaker: TBD.
1130 – 1200	144	GRADUATION.

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24TH FEDERAL LITIGATION COURSE

CASE MANAGEMENT AND RESPONSIBILITIES FOR LITIGATION

I. INTRODUCTION.

II. RESPONSIBILITY FOR LITIGATION.

A. United States Department of Justice.

1. Department of Justice (DOJ) exercises plenary authority over litigation involving the interests of the United States.

> "Except as otherwise authorized by law, the conduct of litigation in which the United States, any agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General." **28 U.S.C. § 516.**
>
> "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties**." 28 U.S.C. § 519.**

2. Organization of the Department of Justice

a) General.

b) Civil Division.

(1) Appellate Staff.

(2) Commercial Litigation Branch.

(3) Federal Programs Branch.

(4) Torts Branch.

(5) Office of Consumer Litigation.

(6) Office of Immigration Litigation

B. United States Attorneys.

1. One United States Attorney appointed by the President for each judicial district. **28 U.S.C. § 541.**

2. Assistant United States Attorneys (AUSA) are appointed by the Attorney General. **28 U.S.C. § 542.**

3. Responsibility of the United States Attorney.

a) General.

"[E]ach United States Attorney, within his district, shall . . . (2) prosecute and defend for the Government, all civil actions, suits or proceedings in which the United States is concerned." **28 U.S.C. § 547.**

b) Retained and delegated cases.

4. Organization of the United States Attorney's Office.

C. Department of the Army.

1. "Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General counsel, TJAG is responsible for litigation in which the Army has an interest." Army Regulation 27-40, para. 1-4b.

2. Within DA, the Chief, Litigation Division, has primary responsibility for supervising litigation of interest to the Army. AR 27-40, para. 1-4d.

3. Website: <www.jagcnet.army.mil>

4. Special Assistant U.S. Attorneys (SAUSAs) and DOJ Special Attorneys. See AR 27-40, para. 1-4e. Army judge advocate attorneys and civilian attorneys, when appointed as SAUSAs under 28 U.S.C. § 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

a) Felony and misdemeanor prosecutions in Federal Court.

b) SAUSAs for civil litigation.

c) Special Attorneys assigned by DOJ (only in civil litigation).

5. Responsibilities of Installation Staff Judge Advocates.

a) Establish and maintain liaison with United States Attorney. AR 27-40, para. 1-5b.

b) Advise Litigation Division by telephone of significant cases and those requiring immediate attention (e.g., temporary restraining orders, habeas corpus, cases with short return dates, cases alleging individual liability arising from performance of official duties, etc.). AR 27-40, paras. 3-1 and 3-3a.

c) Forward by FAX or express mail to HQDA, a copy of all process, pleadings, and other related papers. AR 27-40, para. 3-3b.

d) Assist federal employees sued for actions taken within the course and scope of their employment in securing DOJ representation. AR 27-40, paras. 3-4 and 4-4.

e) Represent the United States in litigation only when directed by the Chief, Litigation Division. AR 27-40, para. 1-4f.

D. Department of the Navy.

1. Navy Regulations, Article 0327 assigns responsibility for all business and commercial law, environmental law, civilian personnel law, real estate and personal property law, intellectual property and procurement and associated litigation to the Office of General Counsel (OGC).

2. Navy Regulations, Article 0331 assigns to the Judge Advocate General responsibility for legal services not assigned to the OGC, including the provision of legal and policy advice to the Secretary of the Navy on military justice, administrative law, claims, operational and international law, and related litigation issues.

3. Website. <www.jag.navy.mil>

E. Department of the Air Force.

1. Air Force Instruction 51-301, Civil Litigation, implements Air Force Directive 51-3 (also titled "Civil Litigation") by setting guidelines for litigation, tax disputes, and legal or administrative proceedings. It was substantially revised on 1 July 2002.[1]

2. Website. <aflsa.jag.af.mil> (Access requires FLITE password)

F. U.S. Coast Guard.

1. Manual for Claims and Litigation, Chapter 18, discusses litigation responsibility.

2. Litigation Point of Contact: Office of Claims and Litigation, U.S. Coast Guard, 2100 Second Street SW, Washington, D.C. 20593-0001; Telephone, 202/267-2245.

3. Website: <www.uscg.mil>

III. CASE MANAGEMENT CHECKLISTS.

A. U.S. Federal District Court.

B. Court of Federal Claims.

IV. CONCLUSION.

[1] This revision includes updated guidance on, *inter alia*: processing representation requests (para. 1.3); indemnification requests (para. 1.4); standards for Privacy Act protection of litigation report documents (para. 1.8.1.4); necessary disclosures in litigation matters (para. 1.8.1.5); a new format for creation of litigation reports (Fig. 1.4); adds and explains certain, specific duties for discovery requests and processing requests for representation (para. 2.3, 2.4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JENNIFER NORRIS, Individually, and as Parent and Legal Guardian of DYLAN NORRIS, et al.,

Plaintiffs,

v. **Case No. 2:03-CV-563-FTM-29SPC**

UNITED STATES OF AMERICA,

Defendant.
_____/

Case Management Report

The parties have agreed on the following dates and discovery plan pursuant to Fed.R.Civ.P. 26(f) and Local Rule 3.05(c):

DEADLINE OR EVENT		AGREED DATE
Certificate of Interested Persons and Corporate Disclosure Statement		Filed.
Motions to Add Parties or to Amend Pleadings		3/19/04
Disclosure of Expert Reports	Plaintiff:	7/16/04
	Defendant:	10/15/04
Discovery Deadline	Fact:	1/19/05
	Expert:	3/18/05
Dispositive Motions, *Daubert,* and *Markman* Motions		7/1/05

DEADLINE OR EVENT		AGREED DATE
Meeting *In Person* to Prepare Joint Final Pretrial Statement		8/29/05
Joint Final Pretrial Statement		9/16/05
All Other Motions Including Motions *In Limine*, Trial Briefs		10/3/05
Final Pretrial Conference		10/3/05
Trial Term Begins		11/1/05
Estimated Length of Trial		10 Days
Jury / Non-Jury		Non-Jury
Mediation	Deadline: Mediator: Address: Telephone:	8/5/05 TBD
All Parties Consent to Proceed Before Magistrate Judge		Yes: No: X Likely to Agree:

I. Meeting of Parties.

Pursuant to Local Rule 3.05(c)(2)(B) or (c)(3)(A), a meeting was held on January 15, 2004, at 1:30 p.m., and was attended in person by:

Name	Counsel For
Ann Frank	Plaintiffs
Mark Steinbeck	United States of America

Counsel for Plaintiffs subsequently met with Kenneth M. Oliver, counsel for the State of Florida, who concurred with the scheduling matters reflected herein.

II. Pre-Discovery Initial Disclosures of Core Information.

A. Fed.R.Civ.P. 26(a)(1)(C) - (D) Disclosures.

The parties agree to exchange information described in Fed.R.Civ.P. 26(a)(1)(C) - (D) by February 27, 2004.

Below is a description of information disclosed or scheduled for disclosure.

Plaintiff's statement of damages.

B. Fed.R.Civ.P. 26(a)(1)(A) - (B) Disclosures.

The parties agree to exchange information referenced by Fed.R.Civ.P. 26(a)(1)(A) - (B) by February 27, 2004.

Below is a description of information disclosed or scheduled for disclosure.

Information required by Rule 26(a)(1)(A) & (B).

III. Agreed Discovery Plan for Plaintiffs and Defendants.

A. Certificate of Interested Persons and Corporate Disclosure Statement.

This Court has previously ordered each party, governmental party, intervenor, non-party movant, and Rule 69 garnishee to file and serve a Certificate of Interested Persons and Corporate Disclosure Statement using a mandatory form. No party may seek discovery from any source before filing and serving a

Certificate of Interested Persons and Corporate Disclosure Statement. A motion, memorandum, response, or other paper — including emergency motion — is subject to being denied or stricken unless the filing party has previously filed and served its Certificate of Interested Persons and Corporate Disclosure Statement. Any party who has not already filed and served the required certificate is required to do so immediately.

Every party that has appeared in this action to date has filed and served a Certificate of Interested Persons and Corporate Disclosure Statement, which remains current:

Yes: ___X___

No:

Amended Certificate will be filed by _____ (party) on or before _____ (date).

B. Discovery Not Filed.

The parties will not file discovery materials with the Clerk except as provided in Local Rule 3.03. The Court encourages the exchange of discovery requests on diskette. *See* Local Rule 3.03 (f). The parties further agree as follows: NA.

C. Limits on Discovery.

Absent leave of Court, the parties may take no more than ten depositions per side (not per party). Fed.R.Civ.P. 30(a)(2)(A); Fed.R.Civ.P. 31(a)(2)(A); Local Rule 3.02(b). Absent leave of Court, the parties may serve no more than twenty-five interrogatories, including sub-parts. Fed.R.Civ.P. 33(a); Local Rule 3.03(a). The parties may agree by stipulation on other limits on discovery. The Court will consider the parties' agreed dates, deadlines, and other limits in entering the scheduling order. Fed.R.Civ.P. 29. In addition to the deadlines in the above table, the parties have agreed to further limit discovery as follows:

1. Depositions. **The parties request leave of Court to take no more than 15 depositions per side based on the nature of the claims in this matter creating the probability that each side will have 4 or more experts and on the number of individual parties and medical providers.**

2. Interrogatories. **The parties request leave of Court to propound**

no more than 50 interrogatories per side based on the nature of the claims in this matter creating the probability that each side will have 4 or more experts and on the number of individual parties and medical providers.

3. Document Requests. NA.

4. Requests to Admit. NA.

5. Supplementation of Discovery. NA.

D. Discovery Deadline.

Each party shall timely serve discovery requests so that the rules allow for a response prior to the discovery deadline. The Court may deny as untimely all motions to compel filed after the discovery deadline. In addition, the parties agree as follows: **to split discovery deadlines to allow expert opinion discovery to be conducted after conclusion of fact discovery, in an effort to make unnecessary the taking of supplemental depositions of expert witnesses.**

E. Disclosure of Expert Testimony.

On or before the dates set forth in the above table for the disclosure of expert reports, the parties agree to fully comply with Fed.R.Civ.P. 26(a)(2) and 26(e). Expert testimony on direct examination at trial will be limited to the opinions, basis, reasons, data, and other information disclosed in the written expert report disclosed pursuant to this order. Failure to disclose such information may result in the exclusion of all or part of the testimony of the expert witness. The parties agree on the following additional matters pertaining to the disclosure of expert testimony: NA.

F. Confidentiality Agreements.

Whether documents filed in a case may be filed under seal is a separate issue from whether the parties may agree that produced documents are confidential. The Court is a public forum, and disfavors motions to file under seal. The Court will permit the parties to file documents under seal only upon a finding of extraordinary circumstances and particularized need. *See Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985). A party seeking to file a document under seal must file a motion to file under seal requesting such Court action, together with a memorandum of law in

support. The motion, whether granted or denied, will remain in the public record.

The parties may reach their own agreement regarding the designation of materials as "confidential." There is no need for the Court to endorse the confidentiality agreement. The Court discourages unnecessary stipulated motions for a protective order. The Court will enforce appropriate stipulated and signed confidentiality agreements. *See* Local Rule 4.15. Each confidentiality agreement or order shall provide, or shall be deemed to provide, that "no party shall file a document under seal without first having obtained an order granting leave to file under seal on a showing of particularized need." With respect to confidentiality agreements, the parties agree as follows: NA.

G. Other Matters Regarding Discovery. NA.

IV. Settlement and Alternative Dispute Resolution.

A. Settlement.

The parties agree that settlement prior to completion of discovery is:

____ likely __X__ unlikely.

The parties request a settlement conference before a U.S. Magistrate Judge.

____ yes __X__ no ____ likely to request in future

B. Arbitration.

Local Rule 8.02(a) defines those civil cases that will be referred to arbitration automatically. Does this case fall within the scope of Local Rule 8.02(a)?

_____ yes __X__ no

For cases **not** falling within the scope of Local Rule 8.02(a), the parties consent to arbitration pursuant to Local Rules 8.02(a)(3) and 8.05(b):

_____ yes __X__ no ____ likely to agree in future

_____ Binding _____ Non-Binding

In any civil case subject to arbitration, the Court may substitute mediation for arbitration upon a determination that the case is susceptible to resolution through mediation. Local Rule 8.02(b). The parties agree that this case is susceptible to

resolution through mediation, and therefore jointly request mediation in place of arbitration:

__X__ yes _____ no _____ likely to agree in future

C. Mediation.

The parties agree to mediate this matter and to use a mediator from the Court's approved list. The parties agree to the date stated in the table above as the last date for mediation.

D. Other Alternative Dispute Resolution. NA

Date: _____

Paul I. Perez
United States Attorney

By: _____
Mark A. Steinbeck
Assistant United States Attorney
Florida Bar No. 913431
2110 First Street, Suite 3-137
Fort Myers, Florida 33901
Telephone: (239) 461-2200
Facsimile: (239) 461-2219
Counsel for the United States

Date: _____

_____
Ann T. Frank
Florida Bar No. 0888370
Ann T. Frank, P.A.
2124 Airport Road South, Suite 102
Naples, Florida 34112
Telephone: (239) 793-5353
Facsimile: (239) 793-6888
Counsel for Plaintiffs

Date: _____

_____
Kenneth M. Oliver

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Facsimile: (239) 939-0070
Counsel for the State of Florida

24TH FEDERAL LITIGATION COURSE
SYSTEMATIC ANALYSIS OF CASES IN FEDERAL LITIGATION

OVERVIEW

I. GENERAL

A. Military decisions, programs, and policies are subject to review by the federal courts.

B. Themes common to litigation against the military departments:

1. Suits almost exclusively in the federal courts.

2. Suits are generally filed against a federal agency.

3. The military and its officials are involved.

II. METHOD OF ANALYSIS

A. Case management and responsibility.

B. Department of Justice representation and removal of case to federal court.

C. Power of the federal court to decide case: Does the federal court have jurisdiction?

1. Grants of jurisdiction.

a) Constitutional limits.

b) Statutory grants.

2. Justiciable case or controversy.

a) Adversarial.

(1) Advisory opinions.

(2) Ripeness.

(3) Mootness.

(4) Standing.

b) Political question.

D. Federal Remedies: Can the court award the relief demanded?

1. Sovereign immunity.

2. Types of remedies:

a) Money.

b) Mandamus.

c) Habeas corpus.

d) Injunctions.

e) Declaratory judgment.

E. Exhaustion of administrative remedies: Has the plaintiff pursued all intra-agency remedies?

1. Basic doctrine.

2. Remedies available.

3. Exceptions.

F. Reviewability: Should the court review and decide issues in controversy?

1. APA.

2. Mindes.

G. Scope of review: To what extent should the federal court substitute its judgment for that of the military decision-maker?

H. Official Immunity.

1. Constitutional Tort Lawsuit.

2. Common Law Tort Lawsuit.

III. CONCLUSION.

24TH FEDERAL LITIGATION COURSE

FEDERAL JURISDICTION

I. FEDERAL JUDICIAL POWER.

A. General.

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; -- to all Cases affecting Ambassadors, other Public Ministers and Consuls; -- to all Cases of admiralty and Maritime Jurisdiction; -- to Controversies to which the United States shall be a party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

-- U.S. Const. art. III, § 2.

B. Limited jurisdiction. See generally Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799).

1. Subjects and Parties. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

2. Cases and Controversies -- Justiciability. Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

II. CONGRESSIONAL GRANTS OF JURISDICTION

A. General.

1. Except for Supreme Court's original jurisdiction derived directly from the Constitution, federal judicial power is dependent upon a statutory grant of jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867).

a. Jurisdictional statute may be more restrictive than the Constitution. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

b. Jurisdictional statute may not exceed constitutional limits of jurisdiction. Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

2. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936).

3. The United States cannot be sued without its consent. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

4. See Selected Federal Statutes, D-III-1 to D-III-4.

B. Federal Question Jurisdiction 28 U.S.C. § 1331.

1. The statute: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

2. Historical origins.

3. The meaning of "arising under federal law."

a. "[A]n action arises under federal law . . . if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law -- whether that proposition is independently applicable or becomes so only by reference from state law." P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, page 889 (3d ed. 1988).

(1) Federal causes of action. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) (Holmes, J.) ("A suit arises under the law that creates the cause of action").

(2) Vindication of right under state law necessarily turns on some construction of federal law. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). Cf. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (federal preemption).

(a) The mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934).

(b) The federal question must be substantial and form an essential part of the cause of action. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Smith v. Grimm, 534 F.2d 1346 (9th Cir.), cert. denied, 429 U.S. 980 (1976).

b. "Well-pleaded complaint" rule: In determining whether a case arises under federal law, a court generally is confined to the well-pleaded allegations of the plaintiff's complaint. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1987); see also, International Primate Protection League v. Administrators of Tulane Education Fund, 500 U.S. 72 (1991); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

-- Federal question cannot simply be the basis of an anticipated defense. Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

-- In declaratory judgment action, federal question jurisdiction is lacking if the federal claim would arise only as a defense to a state created action. Amsouth Bank v. Dale, 386 F.3d 763, 775 (6th Cir. 2004).

-- However, complete preemption provides a limited exception to the well pleaded complaint rule. That is "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). *See also* Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, __ U.S. __, 125 S.Ct. 2363 (2005)(the meaning of a federal tax provision is an important federal law issue that supports federal question jurisdiction in this state quiet title action).

4. What constitutes federal law

   a. Constitution.

   b. Statute.

   c. Federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

d. Executive regulations. *Compare* Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 7-8 (3d Cir. 1964)(validly issued administrative regulations or orders may be treated as "laws of the United States") *with* Chaase v. Chasen, 595 F.2d 59 (1st Cir. 1979)(customs circular concerning employee overtime does not constitute one of the "laws of the United States") *and* Federal Land Bank v. Federal Intermediate Credit Bank, 727 F. Supp. 1055 (S.D. Miss. 1989)(financial directive by Farm Credit Administration not a "law of the United States").

e. Treaties. *Compare* Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro, 293 F.3d 392 (7th Cir. 2002)(holding that Panama Convention provided independent federal question jurisdiction) *with* Chubb & Son, Inc. v. Asiana Airlines, 214 F. 3d 301 (2d Cir. 2000)(holding that court lacks subject matter jurisdiction in absence of treaty relationship between U.S. and South Korea).

5. Elimination of the amount in controversy requirement.

a. Pub. L. No. 94-574, 90 Stat. 2721 (1976) -- Lawsuits against the United States, any agency thereof, or any officer or employee in his or her official capacity.

b. Pub. L. No. 96-486, 94 Stat. 2369 (1980) -- All lawsuits.

6. Federal question jurisdiction statute does not waive the Government's sovereign immunity. See, e.g., Clinton County Com'rs v. U.S. Envtl. Protection Agency, 116 F.3d 1018, 1022 (3rd Cir. 1997); Gochnour v. Marsh, 754 F.2d 1137, 1138 (5th Cir.), cert. denied, 471 U.S. 1057 (1985); State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

C. The Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491.

1. The statutes:

a. "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

-- 28 U.S.C. § 1346(a)(2) ("Little Tucker Act").

b. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort. . . ."

-- 28 U.S.C. § 1491(a)(1) ("Tucker Act").

c. Amendments conferring bid protest jurisdiction.

-- 28 U.S.C. § 1491(b)(1) – (4), as modified by "sunset provision" for district court jurisdiction.

2. General.

a. Must be brought within 6 years of accrual of claim. 28 U.S.C. § 2501.

b. Monetary damages only in Court of Federal Claims (with exception of bid protests.)

c. Jurisdictional statute only; confers no substantive rights for plaintiff. In order to state a claim upon which relief may be granted, must demonstrate independent "money-mandating" basis for relief sought:

(1) Contract (must demonstrate all elements of enforceable contract.)

(2) Statute or regulation with mandatory provisions establishing entitlement to money (military/ civilian personnel claims).

(3) Constitution (Fifth Amendment takings claims heard by COFC).

(4) Not sounding in tort.

3. Concurrent jurisdiction of the district courts and the Court of Federal Claims.

a. Claims not exceeding $10,000: district courts and Court of Federal Claims have concurrent jurisdiction.

b. Claims exceeding $10,000: Court of Federal Claims has exclusive jurisdiction.

(1) The amount of a claim is the total amount of money the plaintiff ultimately stands to recover in the case. Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988); Chabal v. Reagen, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982).

-- Determined by the good-faith allegations of the plaintiff's complaint. Id. See also Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985).

(2) Transfer to Court of Federal Claims under 28 U.S.C. § 1631. State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982).

(3) Waiver of claims in excess of $10,000. Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982); Lichtenfels v. Orr, 604 F. Supp. 271 (S.D. Ohio 1984).

c. Demands for monetary and nonmonetary relief: finding a Tucker Act Claim.

(1) General rules:

(a) The federal courts will look beyond the facial allegations of the complaint to determine what the plaintiff hopes to acquire from the lawsuit. E.g., Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Amoco Prod. Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668 (8th Cir. 1986). But see Gower v. Lehman, 799 F.2d 925 (4th Cir. 1986) (court looked to nature of plaintiff's cause of action rather than relief requested).

(b) The plaintiff cannot hide a claim for money damages by couching the claim in equitable terms. E.g., Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979); Polos v. United States, 556 F.2d 903 (8th Cir. 1977).

(c) Where equitable or declaratory claim serves a significant purpose independent of recovering money damages, it does not necessarily fall under the Tucker Act because it may later become the basis for a money judgment. Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 71 n.15 (1978); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985); Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980).

(d) A claim falls under the Tucker Act when the "prime objective" of the plaintiff's suit is nontort money damages from the United States. E.g., Fairview Township v. United States EPA, 773 F.2d 517 (3d Cir. 1985); United States v. City of Kansas City, 761 F.2d 605 (8th Cir. 1985); Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983).

(2) Distinguishing damages from specific relief or equitable relief. See, Bowen v. Massachusetts, 487 U.S. 905 (1988) (monetary relief, other than damages, may be an incident to specific relief granted).

(3) Bifurcating the Tucker Act and nonmoney claims. Compare Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985), with Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982).

4. The Tucker Act and substantive rights to relief. United States v. Testan, 424 U.S. 392 (1976). See also Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985).

5. Appeal of Tucker Act cases.

a. General rule: Court of Appeals for the Federal Circuit has exclusive jurisdiction over all appeals where the district court's jurisdiction is based, in whole or in part, on the Tucker Act. 28 U.S.C. § 1295; United States v. Hohri, 482 U.S. 64 (1987); Professional Managers' Ass'n v. United States, 761 F.2d 740 (D.C. Cir. 1985); Parker v. King, 935 F.2d 1174 (11th Cir. 1991), cert. denied 112 S. Ct. 3055 (1992); Trayco Inc. v. United States, 967 F.2d 97 (4th Cir. 1992); Banks v. Garrett, 901 F.2d 1084 (Fed. Cir. 1990), cert. denied 498 U.S. 821 (1990); Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985).

b. Exceptions:

(1) Tucker Act claim frivolous or exceeds the jurisdiction of the district court. Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985).

(2) Another statute independently confers jurisdiction. Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985). But cf. Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985); Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985).

(3) Regional court of appeals has already decided the case. Squillacote v. United States, 747 F.2d 432 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). But see Professional Managers Ass'n v. United States, 761 F.2d 740 (D.C. Cir. 1985).

D. The Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671-2680.

1. The statute:

"[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injuries or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

-- 28 U.S.C. § 1346(b).

2. Historical origins.

3. Jurisdictional prerequisites:

a. Administrative claim requirement. 28 U.S.C. § 2675; Lee v. United States, 980 F.2d 1337 (10th Cir. 1992); Avila v. INS, 731 F.2d 616 (9th Cir. 1984).

b. Statute of limitations. 28 U.S.C. § 2401; McNeil v. United States, 964 F.2d 647 (7th Cir. 1992), aff'd 113 S.Ct. 1980 (1993); Conn v. United States, 867 F.2d 916 (6th Cir. 1989); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987).

c. Strictly construed. Lee v. United States, 980 F.2d 1337 (10th Cir. 1992) (administrative claim requirement); Gould v. Dep't of Health and Human Services, 905 F.2d 738 (4th Cir 1990); NcNeil v. United States, 964 F.2d 647 (7th Cir 1992), aff'd, 113 S. Ct. 1980 (1993).

4. Limitations.

a. Limited to the amount of the administrative claim. 28 U.S.C. § 2675(b). See Jackson v. United states, 730 F.2d 808, 810 (D.C. Cir. 1984).

b. Types of torts specifically excepted. 28 U.S.C. § 2680.

(1) Discretionary function.

(2) Intentional torts.

(3) Arising out of combatant activities.

(4) Arising in a foreign country.

c. State statutory limitations.

E. Mandamus. 28 U.S.C. § 1361.

1. The statute: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

2. Historical origins.

F. Habeas Corpus. 28 U.S.C. §§ 2241-2255.

1. The statute:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or any order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

-- 28 U.S.C. § 2241.

2. Historical origins.

3. Jurisdictional prerequisites:

a. Custody: The petitioner must be in custody. 28 U.S.C. § 2241; Maleng v. Cook, 490 U.S. 488 (1989); Wales v. Whitney, 114 U.S. 564 (1885).

(1) Types of custody.

(a) Confinement. E.g., Ex Parte Reed, 100 U.S. 13 (1879).

(b) Involuntary military service. E.g., Parisi v. Davidson, 405 U.S. 34 (1972); Wiggins v. Secretary of the Army, 946 F.2d 892 (5th Cir. 1991).

(2) Jurisdiction is not lost if the petitioner is subsequently released. Carafas v. La Vallee, 391 U.S. 234 (1968); cf. Hensley v. Municipal Court, 411 U.S. 345 (1973) (bail); Jones v. Cunningham, 371 U.S. 236 (1963) (parole).

b. Venue: Petitioner's presence within the territorial jurisdiction of the district court jurisdiction is not an invariable prerequisite. Rather, because the writ of habeas corpus does not act upon the person who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts within its respective jurisdiction as long as the custodian can be reached by service of process. Rasul v. Bush, 542 U.S. 466 (2004). *See also* Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rooney v. Secretary of the Army, 405 F.3d 1029 (D.C. Cir. 2005).

G. Civil Rights Statutes. 28 U.S.C. § 1343.

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of a conspiracy mentioned in section 1985 of Title 42;

(2) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

-- 28 U.S.C. § 1343.

H. Other statutes granting jurisdiction.

I. Provisions often <u>erroneously</u> cited as jurisdictional grounds for federal lawsuits.

1. Administrative Procedure Act, 5 U.S.C. §§ 701-06. Califano v. Sanders, 430 U.S. 99 (1977).

2. Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952).

3. Others.

III. JUSTICIABILITY.

A. Introduction.

1. Constitutional limits on federal jurisdiction.

a. Cases that raise certain subjects or involve certain parties. U.S. Const. art. III, § 2.

b. "Cases" and "Controversies." Id.

2. Justiciability is the term of art employed to give expression to the dual limitation imposed upon the federal courts by the "case and controversy" doctrine. Flast v. Cohen, 392 U.S. 83 (1968).

a. Involves application of both constitutional limitations and prudential concerns.

b. Two-pronged doctrine:

(1) Adversarial prong.

(2) Political question prong.

3. Justiciability and the role of the federal courts. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973).

B. The Adversarial Prong

1. General.

2. Advisory opinions.

a. Definition. An advisory opinion is an answer to a hypothetical question of law unconnected to any particular case.

b. Examples: Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Correspondence of the Justices and Secretary of State Thomas Jefferson (1793).

3. Ripeness.

a. Definition: "[T]he conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in the original).

b. Rationale: Avoid premature adjudication of suits and protect agencies from unnecessary judicial interference. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977). And avoid "abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. Id., at 148-49. See also Nat'l Park Hospitality Ass'n. v. Dept. of Interior, 538 U.S. 803 (2003).

c. Rule: In determining whether a case is ripe for adjudication, a court must--

(1) Evaluate the fitness of the issues for judicial decision; and

(a) Is the agency action final?

(b) Are the issues legal or factual?

(c) Have administrative remedies been exhausted?

(d) What is the nature of the record created?

(2) Determine the hardship to the parties of withholding court decision.

(a) What is the likelihood the challenged action will affect the plaintiff?

(b) What is the nature of the consequences risked by the plaintiff if affected by the action?

(c) Will the plaintiff be forced to alter conduct as a result of the action?

d. Examples:

(1) Pre-enforcement attacks on statutes or regulations. Compare Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), with Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) overruled other grounds Califano v. Sanders, 430 U.S. 99 (1977). See also Nat'l Park Hospitality Ass'n. v. Dept. of Interior, 538 U.S. 803 (2003).

(2) Challenges to pending administrative or judicial proceedings. Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981).

(3) Threat to commit military forces without congressional authorization. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

4. Mootness.

a. Definition: "[M]ootness looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case or controversy' that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

b. General rule: There is no case or controversy once the issues in a lawsuit have been resolved.

c. Test: A case becomes moot when--

(1) "[I]t can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

-- County of Los Angeles v. Davis, 440 U.S. 625, 635 (1979); See also McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992).

d. Examples:

(1) Save the Bay, Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981).

(2) Quinn v. Brown, 561 F.2d 795 (9th Cir. 1977).

(3) Ringgold v. United States, 553 F.2d 309 (2d Cir. 1977).

(4) Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).

(5) Oakville Development Corp. v. FDIC, 986 F.2d 611 (1st Cir. 1993).

(6) Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993).

e. Exceptions:

(1) Capable of repetition, yet evading review. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

(a) Test:

i) The challenged action is too short in its duration to be fully litigated prior to its cessation or expiration; and

ii) There is a reasonable expectation the same complaining party will be subject to the same action again.

-- Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

(b) Examples: Compare Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991) (No. 91-5019), with Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984), aff'd, 762 F.2d 134 (D.C. Cir. 1985) and Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

(2) Voluntary cessation.

(a) Rule: A case is not made moot merely because a defendant voluntarily ceases his allegedly unlawful conduct. United States v. W.T. Grant Co., 345 U.S. 629 (1953).

(b) Example: Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

(3) Collateral consequences.

(a) Rule: A case is not moot where, even though stopped, the government's allegedly unlawful conduct leaves lasting adverse consequences. Sibron v. New York, 392 U.S. 40 (1968).

(b) Example: Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977).

(4) Class actions.

(a) Mootness of the class representative's claim after the class has been certified: the case is not moot. Sosna v. Iowa, 419 U.S. 393 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

(b) Mootness of the class representative's claim after motion for class certification has been made and denied, but before appeal from the denial: the case is not moot. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

i) The Supreme Court has proscribed the interlocutory appeal of denials of class certification. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

ii) The Supreme Court has allowed class members to intervene to appeal the denial of class certification after the named plaintiff's claim has been fully satisfied. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

(c) Mootness of the class representative's claim before class certification: the case may be moot. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975).

(d) Mootness of the claims of the members of the class: the case may be moot or the class may be realigned. Kremens v. Bartley, 431 U.S. 119 (1977).

5. Standing.

a. General.

(1) Focuses primarily on the party seeking to get his complaint before the federal court, and only secondarily on the issues raised.

(2) Subsumes both constitutional and prudential considerations.

b. Constitutional Requirements.

(1) General rule: To establish standing, a plaintiff must demonstrate--

(a) That he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. [Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?] Meese v. Keene, 481 U.S. 465 (1987); George v. State of Texas, 788 F.2d 1099 (5th Cir.), cert. denied, 479 U.S. 866 (1986).

i) An asserted right to have the government act in accordance with law does not confer standing. Allen v. Wright, 468 U.S. 737 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1978).

ii) Mere interest of plaintiff in an issue does not confer standing. Diamond v. Charles, 476 U.S. 54 (1986); Sierra Club v. Morton, 405 U.S. 727 (1972); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986).

(b) That the injury is traceable to the acts or omissions of the defendant (causation requirement). [Is the line of causation between the illegal conduct and injury too attenuated?] Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

(c) That the plaintiff's stake in the controversy is sufficient to ensure that the injuries claimed will be effectively redressed by a favorable court decision. [Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?] Linda R.S. v. Richard D., 410 U.S. 614 (1973).

(2) Illustrative cases: Compare Laird v. Tatum, 408 U.S. 1 (1972), with Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

c. Taxpayer Standing.

(1) Test: To establish standing as a taxpayer, a plaintiff must demonstrate--

(a) A nexus between his taxpayer status and the type of legislation being challenged. Taxpayer standing is only proper where the plaintiff challenges exercises of congressional power under the taxing and spending clause of the Constitution. U.S. Const. art. I, § 8.

(b) A nexus between the taxpayer status and the precise nature of the constitutional infringement alleged. The plaintiff must show a specific constitutional limitation on the taxing and spending power of Congress.

-- Flast v. Cohen, 392 U.S. 83, 102-103 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923).

(2) Illustrative case: Katcoff v. Marsh, 582 F. Supp. 468 (E.D.N.Y. 1984), aff'd, in part 755 F.2d 223 (2d Cir. 1985).

(3) Variations in approach:

(a) Challenge to congressional exercise under the property clause, U.S. Const. art. I, § 3, cl. 2. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

(b) Challenge under the incompatibility clause, U.S. Const. art. I, § 9, cl. 7. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

(c) Challenge under the accounting clause, U.S. Const. art. I, § 9, cl. 7. United States v. Richardson, 418 U.S. 166 (1974)

(d) Challenge under foreign affairs powers, U.S. Const. art. I, § 10, cl. 1. Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir. 1986).

(e) Challenge under war powers and Commander-in-Chief clauses, U.S. Const. art. I, § 8, cl. 11 and art. II, § 2. Pietsch v. Bush, 755 F.Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

d. Citizen Standing. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

e. Prudential Standing Considerations.

(1) Jus tertii.

(a) General rule: A plaintiff may not claim standing to vindicate the constitutional rights of third parties. Tileston v. Ullman, 318 U.S. 44 (1943); Tyler v. Judges of Ct. of Registration, 179 U.S. 405 (1900); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984).

i) Corollary: A plaintiff may only challenge a statute or regulation in the terms in which it is applied to him. Parker v. Levy, 417 U.S. 733 (1974).

ii) Rationale: (A) courts should not make unnecessary constitutional adjudications, and (B) the holders of constitutional rights are the best parties to assert the rights. Singleton v. Wulff, 428 U.S. 106 (1976).

(b) Exceptions:

i) Countervailing policies. See, e.g., Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Singleton v. Wulff, 428 U.S. 106 (1976).

ii) Statute confers third-party standing. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

(2) "Generalized grievances" shared in substantially equal measure by all or a large class of citizens. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

(3) Interest within the "zone of interests" arguably protected or regulated by the law in question. Lujan v. National Wildlife Foundation, 504 U.S. 555 (1992); Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); National Federation of Fed. Employees v. Cheney, 883 F.2d 1038 (D.C. Cir.), reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3214 (1990); Hadley v. Secretary of the Army, 479 F. Supp. 189 (D.D.C. 1979).

f. Associational Standing.

(1) Suits for injuries suffered by the association. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); NAACP v. Alabama, 357 U.S. 449 (1958).

(2) Suits for injuries suffered by members. International Union, UAW v. Brock, 477 U.S. 274 (1986); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1976). See also Randolph-Sheppard Vendors v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986). For an association to have standing to sue on behalf of its members, it must show:

(a) The conduct challenged is injurious to its members;

(b) The claim asserted is germane to the association's purposes; and

(c) The cause can proceed without the participation of the individual members affected by the challenged conduct.

C. The Political Question Prong.

1. Description of the Doctrine.

a. "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable or manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of

embarrassment from multifarious pronouncements by various departments on one question."

-- Baker v. Carr, 369 U.S. 186, 217 (1962).

b. "[T]he doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"

-- Goldwater v. Carter, 444 U.S. 996, 998 (1980) (Powell, J., concurring).

2. Illustrative cases:

a. Organization, training, and weaponry of the armed forces. Gilligan v. Morgan, 413 U.S. 1 (1973).

b. Commitment and use of military forces. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613 (D.D.C. 1984); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. Cir. 1985); Rappenecker v. United States, 509 F. Supp. 1024 (N.D. Cal. 1980); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 389 U.S. 1022 (1967). But see Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

c. Establishment of diplomatic relations. Phelps v. Reagan, 812 F.2d 1293 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir.), cert. denied, 479 U.S. 1012 (1986).

d. Repatriation of POW's. Smith v. Reagan, 637 F. Supp. 964 (E.D.N.C. 1986); Dumas v. President of the United States, 554 F. Supp. 10 (D. Conn. 1982).

e. Relief from or placement in command. Wood v. United States, 968 F.2d 738 (8th Cir. 1992).

f. Setting standards at service academies. Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

g. Establishing promotion quotas. Blevins v. Orr, 553 F. Supp. 750 (D.D.C. 1982), aff'd, 721 F.2d 1419 (D.C. Cir. 1983).

h. Conduct of military intelligence activities. Laird v. Tatum, 408 U.S. 1 (1972); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984).

i. Making political appointments. National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989).

j. Enforcement of accession standards. Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993).

k. President’s designation of pharmaceutical plant in Sudan as enemy property. El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

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SELECTED FEDERAL STATUTES

STATUTE	CITE	GRANT OF JURISDICTION?	WAIVER OF SOVEREIGN IMMUNITY?	PROVIDES/ CREATES REMEDY?
Federal Question	28 USC § 1331	Yes	No	No
Tucker Act	28 USC §§ 1346(a)(2) & 1491	Yes[i]	Limited[ii]	Yes/No[iii]
FTCA	28 USC §§ 1346(b), 2671-2680	Yes	Limited[iv]	Yes/No[v]
Mandamus	28 USC § 1361	Yes	No	Yes[vi]
Habeas Corpus	28 USC §§ 2241-2255	Yes	Limited[vii]	Yes
Civil Rights	28 USC § 1343	Yes	No	Yes[viii]
APA	5 USC §§ 701-706	No	Limited[ix]	Yes[x]
Declaratory Judgment Act	28 USC §§ 2201-2202	No	No	Yes
FOIA	5 USC § 552(a)(4)	Yes	Limited[xi]	Yes[xii]
Privacy Act	5 USC § 552a (g)(1)	Yes	Limited[xiii]	Yes[xiv]
EAJA	28 USC § 2412 (b)	No	Limited[xv]	Yes[xvi]
Civil Rights Act of 1991	42 USC § 1981	No	Limited[xvii]	Yes

[i] For Tucker Act claims not exceeding $10,000.00, concurrent jurisdiction exists in the district courts and the Claims Court. The Claims Court has exclusive jurisdiction over Tucker Act claims exceeding $10,000.00.

ii. The Tucker Act waives the sovereign immunity of the United States for non-tort money claims founded on the Constitution, statute, regulation, or contract with the United States.

iii. The Tucker Act provides a remedy in the sense that it authorizes the recovery of money damages. Under the Tucker Act, however, a plaintiff must rely on some money-mandating provision of the Constitution (e.g., "just compensation" clause), a statute (e.g., Back Pay Act), or regulation (e.g., AAFES regulation incorporating Back Pay Act), or a contract with the United States to create the substantive right on which a claim for relief under the Tucker Act is based. The Tucker Act itself does not create the cause of action.

iv. The FTCA waives the sovereign immunity of the United States for certain tort claims for money damages if a private person would be liable under state law. The waiver of immunity is also limited by an administrative claim requirement and administrative and judicial statutes of limitations.

v. The FTCA provides a remedy in the sense that it authorizes the recovery of money damages. The FTCA, however, does not create the cause of action. The plaintiff must rely on a state law cause of action in order to recover under the FTCA.

vi. To be entitled to relief under the Mandamus Statute, (1) the plaintiff must have a clear right to relief, (2) the defendant must have a duty to act (i.e., a ministerial v. discretionary obligation), and (3) no other remedy is available.

vii. The requirements of "custody" and proper venue are jurisdictional limitations on the right to a writ of habeas corpus.

viii. The right to relief is not based on 28 U.S.C. § 1343. Rather, the plaintiff's substantive claim must be based on a violation of 42 U.S.C. §§ 1981, 1983, or 1985.

ix. The APA waives the sovereign immunity of the United States for non-monetary claims.

x. Plaintiff may only recover equitable (declarative or injunctive) relief on a claim based on the APA. Monetary relief (damages) is not available.

xi. The FOIA waives the sovereign immunity of the United States for claims seeking injunctive relief to compel an agency to produce agency records wrongfully withheld.

xii. In addition to enjoining an agency from withholding releasable records, a court may award the plaintiff costs and attorney fees.

[xiii] The Privacy Act waives the sovereign immunity of the United States for claims: (1) challenging the failure to provide access to records; (2) challenging the refusal to amend records; (3) alleging improper maintenance of the content of records; (4) alleging other breaches of the Act which adversely affect the individual.

[xiv] In a Privacy Act challenge alleging a failure to provide access or a refusal to amend, the plaintiff may recover injunctive relief only. In a challenge based on improper maintenance of the content of the records or other breaches of the Act which adversely affect the plaintiff, the plaintiff may recover actual damages, in addition to equitable relief.

[xv] The EAJA waives the sovereign immunity of the United States for attorney fees to certain prevailing parties in litigation against the United States if the position of the United States was no substantially justified.

[xvi] Generally, the amount of the award under the EAJA is limited to $125.00 per hour.

[xvii] The Civil Rights Act of 1991 waives the sovereign immunity of the United States for compensatory damages in claims of intentional discrimination in employment brought under Title VII of the Civil Rights Act of 1964.

24TH FEDERAL LITIGATION COURSE

FEDERAL REMEDIES

I. SOVEREIGN IMMUNITY.

A. General.

1. The Doctrine: The United States cannot be sued without the consent of Congress. Block v. North Dakota, 461 U.S. 273, 287 (1983).

> "The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit."
>
> --United States v. Sherwood, 312 U.S. 584, 586 (1941).

2. Scope of the Doctrine: Applies to lawsuits against the United States, its agencies, and its officials sued in their official capacities. Hawaii v. Gordon, 373 U.S. 57 (1963); Dugan v. Rank, 372 U.S. 609 (1963).

B. Waivers of Sovereign Immunity.

1. General.

a) Only Congress can waive the sovereign immunity of the United States. Block v. North Dakota, 461 U.S. 273 (1983).

b) Waivers of sovereign immunity are strictly construed. McMahon v. United States, 342 U.S. 25 (1951).

(1) Congressional waivers of sovereign immunity cannot be implied, but must be unequivocally expressed. United States v. Mitchell, 445 U.S. 535 (1980). Booth v. United States, 990 F.2d 617 (Fed. Cir. 1993).

(2) Congressional conditions on waivers of sovereign immunity are jurisdictional prerequisites to suit. Block v. North Dakota, 461 U.S. 273 (1983); Lehman v. Nakshian, 453 U.S. 156 (1981); United States v. Kubrick, 444 U.S. 111 (1979); Phillips v. Heine, 984 F.2d 489 (D.C. Cir. 1993). But see Irwin v. Veterans Administration, 498 U.S. 89 (1990) (statutes of limitations in suits against the United States are presumptively subject to the doctrine of equitable tolling).

2. Monetary relief.

a) The Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491.

b) The Federal Tort Claims Act. 28 U.S.C. § 1346(b).

c) Other specialized statutes.

(1) The Privacy Act, 5 U.S.C. § 552a.

(2) The Unjust Conviction Act, 28 U.S.C. §§ 2513, 1495.

(3) The Equal Access to Justice Act, 28 U.S.C. § 2412; 5 U.S.C. § 504).

(4) The Civil Rights Act of 1991, Pub. L. 102-166, see 42 U.S.C. § 1981 note.

d) Commonly asserted provisions that do not waive sovereign immunity for monetary relief.

(1) The federal question jurisdiction statute, 28 U.S.C. § 1331. See, e.g., Gilbert v. DaGrossa, 756 F.2d 1455 (9th Cir. 1985); Garcia v. United States, 666 F.2d 960 (5th Cir.), cert. denied, 459 U.S. 832 (1982).

(2) The commerce and trade regulation statute, 28 U.S.C. § 1337. See, e.g., Hagemeier v. Block, 806 F.2d 197 (8th Cir. 1986), cert. denied, 481 U.S. 1054 (1987).

(3) The civil rights jurisdiction statute, 28 U.S.C. § 1343. See, e.g., Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).

(4) The mandamus statute, 28 U.S.C. § 1361. See, e.g., Doe v. Civiletti, 635 F.2d 88 (2d Cir. 1980).

(5) The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. See, e.g., Mitchell v. Riddell, 402 F.2d 842 (9th Cir. 1968), cert. denied, 394 U.S. 456 (1969).

(6) The Administrative Procedure Act, 5 U.S.C. §§ 701-06. See, e.g., Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985).

(7) The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

3. Nonmonetary claims.

a) The Administrative Procedure Act (APA), 5 U.S.C. § 702.

> The statute: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . . ."-- 5 U.S.C. § 702

(1) The APA waives sovereign immunity in nonmoney claims against the federal government. See, e.g., Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999); Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984); B.K. Instruments, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983); Jaffee v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

(2) Application of the APA to the military:

(a) General rule: APA is applicable to the military departments.

(b) Exceptions:

(i) Court-martial and military commissions.

(ii) Military authority exercised in the field in time of war or in occupied territory.

b) Other specialized statutes.

(1) The Freedom of Information Act, 5 U.S.C. § 552.

(2) The Privacy Act, 5 U.S.C. § 552a.

II. FEDERAL JUDICIAL REMEDIES.

A. General.

B. Money Damages.

1. Tort claims: FTCA, 28 U.S.C. §§ 1346(b), 2671-2680.

2. Nontort claims: The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491.

a) Dependence of Tucker Act on independently standing substantive rights.

(1) General rule: The Tucker Act does not create a substantive basis for the recovery of money from the United States; it only provides a jurisdictional vehicle for asserting money claims based upon a contract, or upon a constitutional, statutory, or regulatory provision that grants a plaintiff a right to monetary relief. United States v. Testan, 424 U.S. 392 (1976). Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993).

(2) Back pay claims.

(a) Civilian employees: The Back Pay Act, 5 U.S.C. § 5596(b).

(b) Military personnel: The military pay statute, 37 U.S.C. § 204.

(i) The general concept. Until a servicemember's entitlement to pay has been legally terminated by the expiration of his term of enlistment or as otherwise prescribed by law, he has a statutory right to receive the monetary benefits of his service.

(ii) Officers. Werner v. United States, 642 F.2d 404 (Ct. Cl. 1981).

(iii) Enlisted personnel. O'Callahan v. United States, 451 F.2d 1390 (Ct. Cl. 1971).

(3) Disability retirement benefits. 10 U.S.C. § 1201. Sawyer v. United States, 930 F.2d 1577 (Fed. Cir. 1991).

b) Other issues.

(1) Statute of limitations. 28 U.S.C. §§ 2401(a), 2501.

(2) Appeals from Tucker Act cases: U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. §§ 1295(a)(2) and (3).

(3) Interlocutory appeal of grant or denial of motion to transfer from district court to Court of Federal Claims. 28 U.S.C. § 1292(d)(4)(1988). Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991).

C. Mandamus, 28 U.S.C. § 1361.

1. Scope of the mandamus remedy.

   a) General. Mandamus relief is available only when the defendant owes a clear duty to the plaintiff to do the act demanded; the duty must be ministerial, as opposed to discretionary, in character. See, e.g., United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Pescosolido v. Block, 765 F.2d 827 (9th Cir. 1985).

   b) Elements. Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). See also Arabe v. White, 110 Fed. Appx. 51 (9th Cir. 2004); Fallini v. Hodel, 783 F.2d 1343 (9th Cir. 1986); Borntrager v. Stevas, 772 F.2d 419 (8th Cir.), cert. denied, 474 U.S. 1008 (1985); United States v. O'Neil, 767 F.2d 1111 (5th Cir. 1985); Saum v. Widnall, 912 F.Supp. 1384 (D. Colo. 1996); NTEU v. Bush, 715 F. Supp. 405 (D.D.C. 1989).

   c) Plaintiff has a clear right to relief.

      (1) Defendant has a duty to act.

      (2) No other remedy available.

2. Practice pointers.

D. Habeas Corpus, 28 U.S.C. §§ 2241-55.

1. Custody requirement.

a) Courts-martial sentences to confinement. Ex parte Reed, 100 U.S. 13 (1879).

b) Challenges to involuntary military service. Parisi v. Davidson, 405 U.S. 34 (1972).

2. Location of the custodian.

a) Imprisonment. Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

b) Military service--active duty. Ex parte Hayes, 414 U.S. 1327 (1973); Schlanger v. Seamans, 401 U.S. 487 (1971).

c) Military service--reservists. Strait v. Laird, 406 U.S. 341 (1972). But see limitation of Strait v. Laird holding recognized by Rumsfeld v. Padilla, 542 U.S. 426 (2004).

E. Injunctive Relief, Fed. R. Civ. P. 65.

1. Types of Injunctive Relief.

a) Temporary restraining order [TRO].

b) Preliminary injunction.

c) Permanent injunction.

F. Declaratory Judgment. 28 U.S.C. §§ 2201-2202.

1. The statute: "In a case or controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . ."

-- 28 U.S.C. § 2201.

2. Historical origins.

3. Nature of the remedy: A declaratory judgment is an instrument by which a court can adjudicate the rights of parties to a controversy without directing any coercive relief. E. Borchard, Declaratory Judgments 25-26 (2d ed. 1941); Developments in the Law -- Declaratory Judgments, 62 Harv. L. Rev. 787 (1949).

   a) Irreparable injury not a condition precedent to declaratory relief. Steffel v. Thompson, 415 U.S. 452 (1974); CCCO-Western Region v. Fellows, 359 F. Supp. 644 (N.D. Cal. 1972).

   b) Actual controversy must exist between the parties. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941).

   c) May not seek declaratory judgment challenging retention in Armed Forces…habeas corpus is exclusive remedy. Rooney v. Secretary of the Army, 405 F.3d 1029 (D.C. Cir. 2005).

4. Only a remedy, not a grant of jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952).

24TH FEDERAL LITIGATION COURSE

EXHAUSTION OF MILITARY ADMINISTRATIVE REMEDIES

I. INTRODUCTION.

The doctrine of exhaustion of administrative remedies provides that an available administrative remedy must be pursued before seeking relief in court. This judge-made rule is well established in federal jurisprudence, and was, until 1993, the general rule for plaintiffs seeking civil relief from the government. That year, in the case of *Darby v. Cisneros*, 509 U.S. 137 (1993), the U.S. Supreme Court ruled that the exhaustion doctrine was incorporated into the Administrative Procedure Act (APA) (i.e., as a statutory rule) in such a way that it applies *only when required by agency rule* (the case is discussed below). In other words, the agency's rules themselves must require the exhaustion of administrative remedies; if the rules do not make that an explicit requirement, plaintiffs have the option of bypassing the administrative process and proceeding directly to court. *Darby* did not involve construing military regulations, so the question for military practitioners becomes how to distinguish our unique interests from other agencies' situations in cases brought under the APA.

II. THE GENERAL LAW OF EXHAUSTION (PRE *DARBY)*

A. The Majority Rule: A plaintiff must exhaust military administrative remedies before challenging a military decision in the federal courts. See, e.g., Duffy v. United States, 966 F.2d 307 (7th Cir. 1992); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Navas v. Vales, 752 F.2d 765 (1st Cir. 1985); Ballenger v. Marsh, 708 F.2d 349 (8th Cir. 1983); Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978).

B. The Minority Rule (Federal Circuit Rule): Recourse to military administrative remedies is permissive, not mandatory. Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986); Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983); Mathis v. United States, 391 F.2d 938 (Ct. Cl.), vacated on other grounds, 394 F.2d 519 (Ct. Cl. 1968); Wyatt v. United States, 23 Cl. Ct. 314 (1991).

C. In **APA cases** exhaustion is required only when specified by statute. Darby v. Cisneros, 509 U.S. 137 (1993).

1. Federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies before seeking judicial review under the APA, where it is not otherwise required by statute or regulation.

2. A statute, 5 U.S.C. § 704 (Actions Reviewable), overrides previous (pre-Darby) judicial doctrine: "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section . . . unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

3. Distinguishing Darby – it may have limited applicability to the military, although the majority of reported decisions do not recognize a military exception. See, *e.g.*, the following:

a. Military exception recognized: Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994). The court distinguished Darby, holding that "review of military personnel actions . . . is a unique context with specialized rules limiting judicial review." citing Chappell v. Wallace, 462 U.S. 486 (1983).

b. Military exception not recognized: Daugherty v. United States, 212 F.Supp.2d 1279 (N.D. Okla. 2002); Crane v. Secretary of the Army, 92 F.Supp.2d 155 (W.D.N.Y. 2000); St. Clair v. Secretary of the Navy, 970 F.Supp. 645 (N.D.Ill. 1997); Perez v. United States 850 F. Supp. 1354 (N.D. Ill. 1994).

c. In appropriate cases, the military services should continue to assert the exhaustion doctrine as a defense. Seek to distinguish Darby--which was not a military case--when a plaintiff raises it. *See* E.Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test is Not Laid to Rest by Darby v. Cisneros*, 166 Mil. L. Rev. 67 (2000).

(1) The case may be based in part upon non-APA grounds (e.g., constitutional grounds). *See* Cunningham v. Loy, 76 F.Supp.2d 218 (D.Conn. 1999)(Exhaustion of remedies before CGCMR required in mandamus action seeking military promotion).

(2) Congress has established a comprehensive system of review (the military services' Corrections Boards) that thereby requires administrative review before litigation.

(3) The military is a specialized society requiring special rules.

III. Purposes of the Exhaustion Requirement. McKart v. United States, 395 U.S. 185 (1969).

A. Efficiently allocate judicial resources.

B. Avoid needless litigation.

C. Prepare a record.

D. Focus issues.

E. Apply agency expertise.

F. Avoid interference with the agency until the action is completed or authority is exceeded.

G. Permit agencies to discover and correct own errors.

H. Avoid flouting of the administrative process.

I. Jurisdictional Nature of Exhaustion Requirement. Compare Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974), with Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

IV. WHAT REMEDIES MUST BE EXHAUSTED?

A. Boards for Correction of Military Records. 10 U.S.C. § 1552.

--Army Board for Correction of Military Records (ABCMR): 32 C.F.R. § 581.3; AR 15-185.

--Board for Correction of Naval Records (BCNR): 32 C.F.R. Part 723.

--Air Force Board for Correction of Military Records (AFBCMR): 32 C.F.R. Part 865, Subpart A; AFR 31-3.

1. Nature of the remedy.

a. The statute:

> "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. . . [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department."
>
> -- 10 U.S.C. § 1552(a).

2. Scope of the remedy.

3. Composition and procedure.

4. Necessity for recourse to the BCMR/BCNR.

a. General requirement. Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991).

b. Need to exhaust intermediate remedies. Sherengos v. Seamans, 449 F.2d 333 (4th Cir. 1971); 32 C.F.R. §§ 581.3(c)(3), 723.3(c), and 865.9

5. Review of courts-martial.

a. Background. Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1981); Military Justice Act of 1983, Pub. L. No. 98-209, §§ 11(a), 11(b), 97 Stat. 1407 (codified as 10 U.S.C. §§ 1552(f), 1553(a)). See also Stokes v. Orr, 628 F. Supp. 1085 (D. Kan. 1985).

b. Obligation to seek relief before correction board before collaterally challenging court-martial conviction. Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986).

B. Discharge Review Boards. 10 U.S.C. § 1553; 32 C.F.R. Part 70; DOD Dir. 1332.28.

--Army Discharge Review Board (ADRB): 32 C.F.R. § 581.2; AR 15-180.

--Navy Discharge Review Board (NDRB): 32 C.F.R. Part 724.

--Air Force Discharge Review Board (AFDRB): 32 C.F.R. Part 865, Subpart B; AFR 20-10.

1. Nature of the remedy.

a. The statute:

> " The Secretary concerned shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member. . . ."
>
> -- 10 U.S.C. § 1553(a).

2. Scope of the remedy.

3. Composition and procedure.

4. Necessity for recourse to the DRB. Pickell v. Reed, 326 F. Supp. 1086 (N.D. Cal.), aff'd, 446 F.2d 898 (9th Cir.), cert. denied, 404 U.S. 946 (1971); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957).

C. Article 138, UCMJ. 10 U.S.C. § 938.

1. Nature of the remedy.

a. The statute:

> "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."
>
> -- 10 U.S.C. § 938.

b. Scope of the remedy.

c. Procedure.

d. Necessity for recourse to Article 138. Woodrick v. Ungerford, 800 F.2d 1413 (5th Cir. 1986), cert. denied, 481 U.S. 1036 (1987); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1972); Adkins v. United States Navy, 507 F. Supp. 891 (S.D. Tex. 1981).

D. Clemency Boards. 10 U.S.C. §§ 874, 951-954. Kaiser v. Secretary of the Navy, 542 F. Supp. 1263 (D. Colo. 1982).

E. Inspector General. 10 U.S.C. § 3039.

F. Other Remedies.

V. EXCEPTIONS TO THE EXHAUSTION DOCTRINE.

A. General.

1. Inadequacy. Von Hoffburg v. United States, 615 F.2d 633 (5th Cir. 1980); Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989).

2. Futility. Compare Watkins v. United States Army, 541 F. Supp. 249 (W.D. Wash. 1982) and Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989) with Schaefer v. Cheney, 725 F. Supp. 40 (D.D.C. 1989). Cf. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

3. Irreparable injury. Hickey v. Commandant, 461 F. Supp. 1085 (E.D. Pa. 1978).

4. Purely legal issues. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Downen v. Warner, 481 F.2d 642 (9th Cir. 1973).

5. Avoiding piecemeal relief. Walters v. Secretary of the Navy, 533 F. Supp. 1068 (D.D.C. 1982), rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983).

VI. EXHAUSTION AND THE STATUTE OF LIMITATIONS

A. General.

1. Judicial statute of limitations, 28 U.S.C. § 2401(a) -- six years from accrual of the claim. See, e.g., Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985); Walters v. Secretary of Defense, 725 F.2d 107 (D.C. Cir. 1983); Arko v. United States Air Force Reserve Officer Training Program, 661 F. Supp. 31 (D. Colo. 1987). But see Wood v. Secretary of Defense, 496 F. Supp. 192 (D.D.C. 1980).

2. Administrative statute of limitations:

a. Correction boards -- three years. 10 U.S.C. § 1552(b).

b. Discharge review boards -- 15 years. 10 U.S.C. § 1553(a).

B. Exhaustion is permissive--cause of action accrues on the date of the adverse action. Martinez v. United States, 333 F.3d 1295 (Fed. Cir. 2003); Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986); Bonen v. United States, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); Brewster v. Secretary of the Army, 489 F. Supp. 85 (E.D.N.Y. 1980).

C. Exhaustion is mandatory--cause of action accrues after remedy exhausted. See Guitard v. Secretary of the Navy, 967 F.2d 737 (2d Cir. 1992); Blassingame v. Secretary of the Navy, 811 F.2d 65 (2d Cir. 1987); Smith v. Marsh, 787 F.2d 510 (10th Cir. 1986); Dougherty v. United States Naval Bd. for Correction of Naval Records, 784 F.2d 499 (3d Cir. 1986); Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985); Cf. Guerrero v. Marsh, 819 F.2d 238 (9th Cir. 1987) (court can order correction board to decide whether to waive administrative statute of limitation).

1. Theory: The federal court is reviewing the administrative board's refusal to grant an application for relief; it is not reviewing the underlying adverse action that was the basis of the application for administrative relief.

   a. Scope of review: Limited to the administrative record.

   b. Scope of relief: nonmonetary.

2. What about successive applications to the Correction Board? Compare Yagjian v. Marsh, 571 F. Supp. 698 (D.N.H. 1983); Kaiser v. Secretary of the Navy, 525 F. Supp. 1226 (D. Colo. 1981); Mulvaney v. Stetson, 470 F. Supp. 725 (N.D. Ill. 1979), with Nichols v. Hughes, 721 F.2d 657 (9th Cir. 1983); Ballenger v. Marsh, 708 F.2d 349 (8th Cir. 1983); Bethke v. Stetson, 521 F. Supp. 488 (N.D. Ga. 1979), aff'd, 619 F.2d 81 (5th Cir. 1980).

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24TH FEDERAL LITIGATION COURSE

REVIEWABILITY

I. INTRODUCTION.

A. Meaning of nonreviewability.

B. Development of Reviewability Doctrine.

1. 19th Century: Presumption of nonreviewability in cases involving the federal government. Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

2. Early 20th Century:

a. Demise of presumption of nonreviewability in non-military cases. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

b. Continued presumption of nonreviewability in military cases. Reaves v. Ainsworth, 219 U.S. 296 (1911); Orloff v. Willoughby, 345 U.S. 83 (1953).

3. Late 20th Century: Demise of the presumption of nonreviewability in military cases. Harmon v. Brucker, 355 U.S. 579 (1958).

II. TYPES OF CHALLENGES THAT ARE REVIEWABLE.

A. Lack of Court-Martial Jurisdiction over the Person.

1. Failure to acquire military status. Koh v. Secretary of the Air Force, 719 F.2d 1384 (9th Cir. 1983); Allen v. Weinberger, 546 F. Supp. 455 (E.D. Mo. 1982).

2. Termination of military status. Taylor v. United States, 711 F.2d 1199 (3d Cir. 1983); Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

B. Violation of a Statute or a Regulation.

1. Statute. Harmon v. Brucker, 355 U.S. 579 (1958).

2. Regulation. Dodson v. United States, 988 F.2d 1199 (Fed. Cir. 1993);

C. Violation of the Constitution.

1. Unconstitutional action.

a. Denial of due process. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Rustad v. United States Air Force, 718 F.2d 348 (10th Cir. 1983).

b. Violation of a substantive constitutional right. Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980).

2. Unconstitutional program or policy. Compare Goldman v. Weinberger, 475 U.S. 503 (1986), Meinhold v. Department of Defense, 34 F.3d 1469 (9th Cir. Aug. 31, 1994) and Steffan v. Aspin, 41 F.3d 677 (D.C. Cir. 1994), with Khalsa v. Weinberger, 787 F.2d 1288 (9th Cir. 1986).

D. Abuse of Discretion. Cherry v. United States, 697 F.2d 1043 (Fed. Cir. 1983).

III. REVIEWABILITY OF MILITARY DECISIONS.

A. Administrative Procedure Act (APA), 5 U.S.C. § 701.

1. Applicability to the armed forces.

a. General. The APA applies to the military in peacetime. Ornato v. Hoffman, 546 F.2d 10 (2d Cir. 1976).

b. Exceptions:

(1) Courts-martial and military commissions.

(2) Military authority exercised in the field in the time of war or in occupied territory.

2. Reviewability under the APA.

a. General rule: Federal administrative actions presumptively reviewable under the APA. 5 U.S.C. § 702; Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (There is a "strong presumption that Congress intends jurdicial review of administrative action.").

b. Exceptions:

(1) "Statutory preclusion" -- another statute precludes judicial review. 5 U.S.C. § 701(a)(1).

(a) General. To overcome the presumption of reviewability there must be "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 673, quoting Block v. Community Nutrition Inst., 467 U.S. 340, 349, 351 (1984). See also Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986).

(b) Examples.

i) Military Claims Act, 10 U.S.C. §§ 2733, 2735. Hata v. United States, 23 F.3d 230 (9th Cir. 1994).

ii) National Guard Claims Act, 32 U.S.C. § 715. Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985).

iii) Civil Service Reform Act, 5 U.S.C. §§ 4301-4305. See Bush v. Lucas, 462 U.S. 367 (1983); Jones v. TVA, 948 F.2d 258 (6th Cir. 1991).

2) Agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2).

(a) General rule: An action is committed to agency discretion by law if the statute under which the action was taken is drawn in such broad terms that in a given case "there is no law to apply." Webster v. Doe, 486 U.S. 592 (1988); Kreis v. Secretary of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989); see also Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993) (judicial review is only appropriate where the Secretary's discretion is limited and there are tests and standards against which the court can measure his conduct).

(b) Factors to be considered. American Fed'n of Gov't Employees v. Brown, 680 F.2d 722 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); AFGE v. United States, 602 F.2d 574 (3d Cir. 1979).

i) The broad discretion given an agency in a particular area of operation.

ii) The extent to which the challenged action is the product of political, economic, or managerial choices that are inherently not subject to judicial review.

iii) The extent to which the challenged agency action is based on some special knowledge or expertise.

(c) Effect of agency regulations and policies. See Dodson v. United States, 988 F.2d 1199 (Fed. Cir. 1993); Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985). Cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1953); Accardi v. Shaughnessy, 347 U.S. 260 (1954) (agencies must follow their own regulations).

(d) Agency decisions not to use enforcement powers -- presumptively nonreviewable. Heckler v. Chaney, 470 U.S. 821 (1985).

B. The "Mindes Test."

1. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

a. Threshold allegations.

(1) Violation of a constitutional, statutory, or regulatory provision.

(2) Exhaustion of administrative remedies.

b. Balancing factors:

(1) Nature and strength of plaintiff's claim.

(2) Potential injury to plaintiff if review is refused.

(3) Interference with the military function.

(4) Degree of military expertise and discretion involved.

2. Examples: Wenger v. Monroe, 282 F.3d 1068 (9th Cir. 2002); Guerra v. Scruggs, 942 F.2d 270 4th Cir. 1991); Saum v. Widnall, 912 F.Supp. 1384 (D. Colo. 1996).

3. Application of Mindes in the federal courts.

a. Courts that follow Mindes:

(1) 1st Circuit: Navas v. Gonzalez Vales, 752 F.2d 765 (1st Cir. 1985).

(2) 4th Circuit: Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985).

(3) 5th Circuit: NeSmith v. Fulton, 615 F.2d 196 (5th cir. 1980); West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978).

(4) 9th Circuit: Wenger v. Monroe, 282 F.3d 1068 (9th Cir. 2002); Barber v. Widnall, 78 F.3d 1419 (9th Cir. 1996); Christoffersen v. Washington State National Guard, 855 F.2d 1437 (1988); Sandidge v. Washington, 813 F.2d 1025 (9th Cir. 1987). But see Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (Mindes doctrine does not apply to equitable estoppel against the military), cert. denied, 498 U.S. 957 (1990).

(5) 10th Circuit: Clark v. Widnall, 51 F.3d 917 (10th Cir. 1995); Costner v. Oklahoma Army National Guard, 833 F.2d 905 (10th Cir. 1987).

b. Courts that may follow Mindes:

(1) 6th Circuit: Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983).

(2) D.C. Circuit: Kreis v. Secretary of the Air Force, 648 F. Supp. 383 (D.D.C. 1986), aff'd in part rev'd in part, 866 F.2d 1508 (D.C. Cir. 1989). But see Doe v. Rumsfeld, 297 F.Supp. 2d 119 (D.D.C. 2003)(*Kreis* "suggests to this court that the D.C. Circuit may not look particularly favorably upon the *Mindes* analysis.").

(3) Federal Circuit: Dodson v. United States, 988 F.2d 1199, 1207 n.7 (Fed. Cir. 1993).

c. Courts that do not follow Mindes:

(1) 2d Circuit: Jones v. New York State Div. of Mil. And Nav. Affairs, 166 F.3d 45 (2d Cir. 1999); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976). But see Furman v. Edwards, 657 F. Supp. 1243 (D. Vt. 1987) (suggesting Mindes consistent with 2d Circuit decisions).

(2) 3d Circuit: Jorden v. National Guard Bureau, 799 F.2d 99 (3d Cir. 1986); Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981).

(3) 7th Circuit: Knutson v. Wisconsin Air National Guard, 995 F.2d 765 (7th Cir. 1993), cert. denied, 510 U.S. 933 (1993).

(4) 8th Circuit: Watson v. Arkansas Nat. Guard, 886 F.2d 1004 (1989).

(5) 11th Circuit: Winck v. England, 327 F.3d 1296 (11th Cir. 2003).

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24TH FEDERAL LITIGATION COURSE

SCOPE OF REVIEW

I. ENLISTMENT CONTRACTS.

A. Standard: Traditional contract principles. Peavy v. Warner, 493 F.2d 748 (5th Cir. 1974).

B. The problem of recruiter representations. Compare Helton v. United States, 532 F. Supp. 813 (S.D. Ga. 1982), and Withum v. O'Connor, 506 F. Supp. 1374 (D.P.R. 1981), with McCracken v. United States, 502 F. Supp. 561 (D. Conn. 1980).

C. Remedy: Cure or Recision. Pence v. Brown, 627 F.2d 872 (8th Cir. 1980); Allen v. Weinberger, 546 F. Supp. 455 (E.D. Mo. 1982); Mansfield v. Orr, 545 F. Supp. 118 (D. Md. 1981). Cf. Schneble v. United States, 614 F. Supp. 78 (S.D. Ohio 1985).

II. CONSCIENTIOUS OBJECTOR DETERMINATIONS.

A. Decisional Framework: (AR 600-43)

B. Standard: Basis-in-Fact. Estep v. United States, 327 U.S. 114 (1946); Woods v. Sheehan, 987 F.2d 1454 (9th Cir. 1993); Wiggins v. Secretary of the Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991); Koh v. Secretary of the Air Force, 719 F.2d 1384 (9th Cir. 1983), rev'g, 559 F. Supp. 852 (N.D. Cal. 1982).

III. DISCRETIONARY DECISIONS.

A. Applicable Standards. See generally California v. Bennett, 843 F.2d 333 (9th Cir. 1988); Cranston v. Clark, 767 F.2d 1319, 1320-21 (9th Cir. 1985).

1. Substantial Evidence: Evidence a reasonable mind might accept as adequate to support a conclusion. It can be somewhat less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence doesn't prevent the agency's finding from being supported by substantial evidence.

2. Arbitrary and Capricious: A highly deferential standard that determines

whether the decision was based on relevant factors and whether there was a clear error in judgment.

B. Illustrative Cases.

1. BCMR and BCNR decisions.

a. Decision to deny a hearing. Kalista v. Secretary of the Navy, 560 F. Supp. 608 (D. Colo. 1983).

b. Decision to deny relief. White v. Secretary of the Army, 878 F.2d 501 (D.C. Cir. 1989); Burns v. Marsh, 820 F.2d 1108 (9th Cir. 1987); Wronke v. Marsh, 787 F.2d 1569 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986); Koster v. United States, 685 F.2d 407 (Ct. Cl. 1982); Mahoney v. United States, 610 F. Supp. 1065 (S.D.N.Y. 1985); Fairchild v. Lehman, 609 F. Supp. 287 (E.D. Va. 1985), aff'd, 814 F.2d 1555 (Fed. Cir. 1987).

c. Interpretation of agency regulations. Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir. 1989); Benvenuti v. Department of Defense, 613 F. Supp. 308 (D.D.C. 1985), aff'd, 802 F.2d 469 (Fed. Cir. 1986).

d. Secretary's decision on Correction Board recommendation. Miller v. Lehman, 801 F.2d 492 (D.C. Cir. 1986); Selman v. United States, 723 F.2d 877 (Fed. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); Boyd v. United States, 207 Ct. Cl. 1 (1975), cert. denied, 424 U.S. 911 (1976).

2. Medical fitness determinations. Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983); deCicco v. United States, 677 F.2d 66 (Ct. Cl. 1982); Sidoran v. Commissioner, 640 F.2d 231 (9th Cir. 1981).

3. Separation of Military and Naval Academy cadets. Dougherty v. Lehman, 688 F.2d 158 (3d Cir. 1982), aff'g, 539 F. Supp. 4 (E.D. Pa. 1981); Love v. Hidalgo, 508 F. Supp. 177 (D. Md. 1981).

4. Barring persons from post. Berry v. Bean, 796 F.2d 713 (4th Cir. 1986); Serrano-Medina v. United States, 709 F.2d 104 (1st Cir. 1983), aff'g, 539 F. Supp. 719 (D.P.R. 1982); Tokar v. Hearne, 699 F.2d 753 (5th Cir.), cert. denied, 464 U.S. 844 (1983).

5. Decisions under the Missing Persons Act. Luna v. United States, 810 F.2d 1105 (Fed. Cir. 1987); Cherry v. United States, 697 F.2d 1043 (Fed. Cir. 1983); Pitchford v. United States, 666 F.2d 533 (Ct. Cl. 1981).

6. Hardship discharges. Jackson v. Allen, 553 F. Supp. 528 (D. Mass. 1982).

IV. VIOLATIONS OF STATUTES AND REGULATIONS.

A. General. Deference is afforded to the agency's interpretation of its regulations and the statutes it is responsible for interpreting. Udall v. Tallman, 380 U.S. 1 (1965); Wronke v. Marsh, 787 F.2d 1569 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986). Cf. Middendorf v. Henry, 425 U.S. 25, 43 (1976).

B. Violations of Statutes and Regulations. E.g., Harmon v. Brucker, 355 U.S. 579 (1958); Barnett v. Weinberger, 818 F.2d 953 (D.C. Cir. 1987); Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979).

C. Prerequisites to the enforcement of statutory or regulatory provisions.

1. The statute or regulation must be for the benefit of the individual ("zone-of-interests"). Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972); Hadley v. Secretary of the Army, 479 F. Supp. 189 (D.D.C. 1979).

2. The violation must substantially prejudice the plaintiff. Compare Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978), with Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

V. CONSTITUTIONAL VIOLATIONS.

A. Due Process. See, e.g., Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972).

B. Substantive Violations.

1. General: Deference to military concerns. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986); United States v. Albertini, 472 U.S. 675 (1985); Rostker v. Goldberg, 453 U.S. 57 (1981); Brown v. Glines, 444 U.S. 348 (1980).

2. Standard of review: Military policies presumptively constitutional if reasonably relevant and necessary to further national defense. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985); Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984), aff'd sub nom. Goldman v. Weinberger, 475 U.S. 503 (1986); Mack v. Rumsfeld, 609 F. Supp. 1561 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986).

VI. INADEQUATE ADMINISTRATIVE RECORDS.

A. General.

B. Supplement in the Court. Simmons v. Marsh, 564 F. Supp. 379 (D.D.C. 1983); Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975).

C. Remand to the Agency. Roelofs v. Secretary of the Army, 628 F.2d 594 (D.C. Cir. 1980); Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

VII. APPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT (APA).

A. APA is Applicable to the Military. Ornato v. Hoffman, 546 F.2d 10 (2d Cir. 1976).

B. Exceptions:

1. Courts-martial and military commissions.

2. Military authority exercised in the field in the time of war or in occupied territory.

C. Scope of Review. 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

1. Compel agency action unlawfully withheld or unreasonably delayed; and

2. Hold unlawful and set aside agency action, findings, and conclusions found to be--

a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

b. contrary to constitutional right, power, privilege, or immunity;

c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

d. without observance of procedure required by law;

e. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

f. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

D. Compare the APA standard to the legal standard of review for military correction board decisions:

A plaintiff is bound by the ABCMR's determination unless he establishes that the determination was arbitrary and capricious, contrary to law, or unsupported by substantial evidence [citations omitted] and unless he does so by cogent and clearly convincing evidence. Wronke v. Marsh, 787 F.2d 1569, 1576 (Fed. Cir. 1986).

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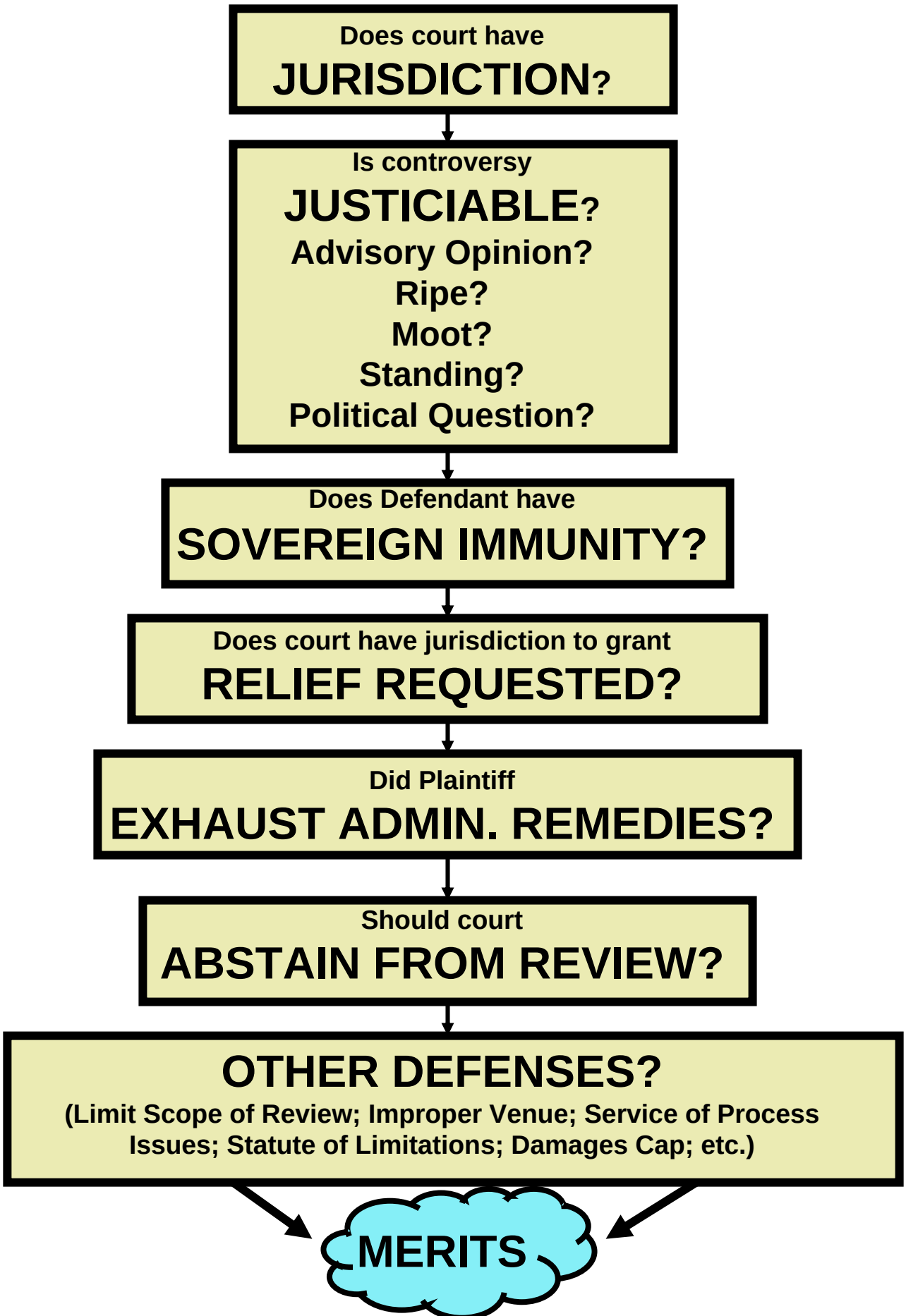
Does court have
JURISDICTION?
Is controversy
JUSTICIABLE?
Advisory Opinion?
Ripe?
Moot?
Standing?
Political Question?
Does Defendant have
SOVEREIGN IMMUNITY?
Does court have jurisdiction to grant
RELIEF REQUESTED?
Did Plaintiff
EXHAUST ADMIN. REMEDIES?
Should court
ABSTAIN FROM REVIEW?
OTHER DEFENSES?
(Limit Scope of Review; Improper Venue; Service of Process Issues; Statute of Limitations; Damages Cap; etc.)
MERITS

24TH FEDERAL LITIGATION COURSE

REMOVAL OF CASES TO FEDERAL COURT

Outline of Instruction

I. INTRODUCTION

State courts of general jurisdiction may handle virtually any case, even those involving federal questions and federal defendants. There is no general principle of law that federal issues or federal defendants get a federal forum. There are reasons, however, why the federal government or a federal defendant may prefer a federal forum to a state forum (*e.g.*, avoidance of local bias and uniform application of federal laws). Access to the federal forum, however, comes only through the authority of a federal statute. Certain federal statutes permit federal defendants to remove their cases from the state court to a federal court. Our focus is how and when we remove a case to the federal court when the United States, one of its agencies, employees, or a service member is sued in a state court.

II. REMOVAL

A. General.

1. Removal is a procedure unique to our federal system of government, a creature of statute, unknown at common law. It is the practice of transferring a cause of action from a state court to the United States District Court. In the absence of express statutory authority to remove a case, a case brought in a state court must remain there. Further, a case that might otherwise be removable may not be removed if a statute prohibits removal (a corollary of the principle that federal courts are courts of limited jurisdiction). See, *e.g.*, 28 U.S.C. § 1445 (this statute, titled "Nonremovable Actions" prohibits the removal of certain causes of action, including, for example, civil actions against a railroad or its receivers, civil actions in state courts arising under state workmen's compensation laws).

2. Removal statutes most often encountered:

   a. 28 U.S.C. § 1441, general removal statute.

   b. 28 U.S.C. § 1442, removal of cases of federal officers sued or prosecuted in state court.

   c. 28 U.S.C. § 1442a, removal of cases of service members sued or prosecuted in state court.

   d. 28 U.S.C. § 2679(d), federal employee's immunity act (commonly referred to as the "Westfall Act").

   e. 10 U.S.C. § 1089, physician's immunity act (also known as the "Gonzalez Act").

   f. 10 U.S.C. § 1054, lawyer's immunity act.

3. Removal issues in a particular case arise from three basic (procedural) questions:

   a. What statute permits removal?

   b. How is removal accomplished?

   c. What happens to the case after it is removed?

B. Removal Statutes. (The time and technical requirements for the various removal statutes are discussed below at "**C. Removal Procedures**".)

1. **28 U.S.C. § 1441. Actions removable generally**.

a. **Original jurisdiction**. This statute allows removal of civil (not criminal) cases from state to federal court (for the district in which the action is pending) provided that the federal court has original jurisdiction. Original jurisdiction falls into two categories: federal question and diversity.

(1) **Federal question**. Removal of cases invoking a federal question is permitted without regard to citizenship of the parties and without regard to the amount in controversy. 28 U.S.C. § 1441(b).

(a) Since federal courts are courts of limited jurisdiction, federal question jurisdiction exists only if a federal statute creates it. The most common jurisdictional basis for federal questions is 28 U.S.C. § 1331 (granting the federal courts jurisdiction over cases arising under the Constitution, treaties, or laws of the United States).

(b) All defendants must join in the petition for removal. Doe v. Kerwood, 969 F.2d 165 (5th Cir. 1992).

(2) **Diversity of citizenship**. Removal is also permitted of cases over which the federal courts have diversity jurisdiction. Diversity refers to a circumstance where there is no common state citizenship between plaintiffs and defendants. The statutory basis of diversity jurisdiction is 28 U.S.C. § 1332. The same jurisdictional rules apply to removal as to diversity cases.

(a) **Amount in controversy.** The amount in controversy must be at least $75,000. 28 U.S.C. § 1332(a).

(b) **Complete diversity.** Diversity must be complete; *i.e.*, no plaintiff and defendant may be citizens of the same state.

(c) In addition to the jurisdictional concerns, there are some special rules for removal of diversity cases.

i) No defendant (properly joined and served) may be a citizen of the state where the action is brought. If plaintiff sues in one defendant's home state, no defendant may remove (provided the home state defendant has been served) even where there is complete diversity. 28 U.S.C. § 1441(b); Laughlin v. Prudential Ins. Co., 882 F.2d 187 (5th Cir. 1989).

ii) In determining diversity, disregard fictitious names. 28 U.S.C. § 1441(a); Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, *cert. den.* 496 U.S. 937 (1989).

iii) All defendants must join in the petition for removal. P.P. Farmers' Elevator Co. v. Farmers Elev. Mut. Ins. Co., 395 F.2d 546 (7th Cir. 1968).

b. **Narrow construction**. Because removal infringes upon state authority and sovereignty, the provisions of § 1441 are strictly construed, and doubts are resolved in favor of remand to the state court. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); Mishimoto v. Federman & Assoc., 903 F.2d 709 (9th Cir. 1990); Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982).

(1) Courts of appeals are split on whether § 1441(a) requires federal jurisdiction over the entire action for removal. See Archuleta v. LaCuesta, 131 F.3d 1359 (10th Cir. 1997)(discribing the split).

(2) Under § 1441(c), however, if any separate and independent claim in a case invokes federal question jurisdiction, the entire case is removed. The district court may remand all matters in which state law predominates. This may provide a jurisdictional basis for removal that is separate from § 1441(a).

c. **Well-pleaded complaint rule**. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Federal defenses (*e.g.*, federal preemption) to state law claims are not grounds for removal because the defense does not confer jurisdiction on the federal court. Burda v. M. Ecker Co., 954 F.2d 434 (7th Cir. 1992).

d. **Artful pleading doctrine.** Sometimes referred to as the corollary of the well-pleaded complaint rule, this provides that a plaintiff may not frame his action under state law and omit federal questions that are essential to recovery, nor artfully omit facts that indicate federal jurisdiction. Marzuki v. AT&T Technologies, 878 F.2d 203 (7th Cir. 1989); Oglesby v. RCA Corp., 752 F.2d 272 (7th Cir. 1985).

e. **Preemption**. Sometimes Congress preempts state laws in areas of federal concern. When preemption is complete, leaving no state claim at all, removal is proper even where the well-pleaded complaint relies only upon state law. Caterpillar Inc. v. Williams, 482 U.S. 386 (1987). This special exception occurs only where Congress has "occupied the field" as in LMRA and ERISA cases. While these are special statutes, much of the modern case law regarding removal involves questions of preemption.

2. **28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted.**

The right of the individual to remove is absolute, should be liberally granted, and does not require non-federal co-defendants to join. Willingham v. Morgan, 395 U.S. 402 (1969). *See, e.g.*, Oklahoma Bankers Ass'n v. Home Sav. & Loan Ass'n, 625 F. Supp. 993 (W.D. OK 1984).

a. **Civil or criminal.** Section 1442 provides for removal of civil or criminal actions brought in state court against officers of the United States.

(1) Unlike § 1441, this section allows removal of a criminal action.

(2) Contempt proceedings against a federal official ancillary to a private state court action are removable. Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986).

b. **Officers and agencies of U.S.** This provision allows removal of actions against officers of the United States or any agency thereof, or against a person acting under an officer or agency of the United States; and since 1996, allows removal of actions against the United States or any agency thereof.

(1) The statute extends to officers of the United States or officers of agencies of the United States. Mignogna v. Sair Aviation, Inc., 937 F.2d 37 (2d Cir. 1991).

(2) Before 1996 agencies of the government did not enjoy a right of removal. International Primate Protection Educational Fund, 500 U.S. 72 (1991). Congress amended the statute in 1996 to overrule this case. See, Nebraska v. Bentson, 146 F.3d 676 (9th Cir. 1998).

(3) The statute also allows removal by an individual who is not a federal officer, but who at the time of the events giving rise to the action, was acting under the control and direction of a

federal officer. *See* Colorado v. Maxwell, 125 F. Supp. 18 (D. Colo. 1954) (city police chief was acting under a federal officer while detaining a drunk soldier at the request of an Air Force officer).

c. **Color of office.** Removal under this provision applies only for actions taken under color of office.

(1) **Federal defense must be alleged.** In contrast to § 1441 (and the well-pleaded complaint rule) here a federal defense is both necessary and sufficient. Mesa v. California, 489 U.S. 121 (1989). *Compare* Georgia v. Walker, 660 F. Supp. 952 (M.D. Ga. 1987) (mail carrier charged with DUI not entitled to removal), *with*, Puerto Rico v. Santos-Marrero, 624 F. Supp. 308 (D. P.R. 1985) (soldier charged with reckless driving while part of a convoy entitled to removal).

(2) **Broad construction.** The statute is read broadly to allow a federal officer a federal forum for a federal defense.

(a) It is usually sufficient to show that the federal defendant's relationship with the plaintiff derived from official duties. Willingham v. Morgan, 395 U.S. 402 (1969).

(b) "Color of office" is broader than "scope of employment." Palermo v. Rorex, 806 F.2d 1266 (5th Cir.), *cert. den.*, 484 U.S. 819 (1987). See also Las Cruces v. Maldonado, 652 F. Supp. 138 (D. N.M. 1986) (assault of subordinate by Postal Service supervisor was under color of office).

3. **28 U.S.C. § 1442a. Members of armed forces sued or prosecuted.**

a. **Armed forces.** This provision is very similar to § 1442 but applies only to members of the armed forces.

(1) Members of the military are "officers of the United States" under § 1442, so there is some redundancy here.

(2) Reservists are "members of the armed forces" even if on inactive duty status. Gilbar v. U.S., 1998 WL 1632693 (S.D. Ohio) (citing Howard v. Sikula, 627 F. Supp. 497 (S.D. Ohio 1986)).

(3) Retirees are members of the armed forces" for purposes of removal of proceeding on account of act done under color of office. Matter of Marriage of Smith, 549 F. Supp. 761 (D.C. Tex. 1982).

b. **Civil or criminal.** It applies to both civil and criminal cases.

c. **Color of Office.** The case must have arisen from actions taken under color of office. The analysis of this factor by courts is highly case specific. Compare, Georgia v. Westlake, 929 F. Supp. 1516 (M.D. GA 1996) (traffic accident not under color of office) with Puerto Rico v. Santor-Marreero, 624 F. Supp. 308 (D. Puerto Rico 1985) (traffic accident occurred under color of office).

d. **Before trial.** Section 1442a offers some additional protection from § 1442 because removal can be accomplished "any time before trial."

4. **28 U.S.C. § 2679(d). Federal Employees Liability Reform and Tort Compensation Act** (the "Westfall Act").

a. **Individual immunity.** A suit against the United States is the exclusive remedy for personal injury, death, or property damage caused by a federal employee acting within the scope of employment. Immunity of the individual is absolute. U.S. v. Smith, 499 U.S. 160 (1991).

b. **Substitute U.S.** After removal of the case to federal district court, the individual defendant is dismissed and the case is "deemed an action against the United States."

c. **Before trial.** Removal may be accomplished any time before trial.

d. **Jurisdiction.** Unlike the general removal statute (§ 1441), removal under this statute does not depend on underlying federal jurisdiction. Once the United States is substituted as defendant, it may assert any defense available to it. If such a defense affects jurisdiction (*e.g.* discretionary function, sovereign immunity), the case must be dismissed.

e. **Procedure.** Before removal is permitted, the Attorney General (through the U.S. Attorney) must certify that the federal employee was acting within the scope of employment at the time of the act complained of.

f. **Review.**

(1) The federal employee may challenge the U.S. Attorney's refusal to certify by petition to the federal district court. In the event that the petition is filed in a civil action or proceeding in a state court, the case may be removed by the Attorney General, reviewed by the district court, and then remanded if

the denial of certification is upheld. Section 2679(d)(3).

(2) Certification is also reviewable by the U.S. district court. Gutierrez v. Lamagno, 515 U.S. 417 (1995). If certification is reversed, it is not clear whether the case may or must be remanded.

5. **10 U.S.C. § 1089. Gonzalez Act**.

a. **Individual immunity.** The exclusive remedy for medical malpractice involving armed forces medical personnel is suit against the United States under FTCA. **(NOTE:** 28 U.S.C. § 2679(d) generally covers these cases in lieu of § 1089. U.S. v. Smith, 499 U.S. 160 (1991))

b. **Substitute U.S.** Upon removal to federal court the individual defendant is dismissed and the United States is substituted as defendant.

6. **10 U.S.C. § 1054. Lawyers immunity.**

a. **Individual immunity.** The exclusive remedy for malpractice by a member of a DoD legal staff is a suit against the United States under the FTCA (Again, 28 U.S.C. § 2679(d) generally covers these cases).

b. **Substitute U.S.** Upon removal to federal court, the individual is dismissed and the United States is substituted as the defendant.

C. Removal Procedures.

1. Civil Actions.

a. **Notice of removal.** Removal is accomplished under 28 U.S.C. § 1446(a) by--

(1) filing a notice of removal in the United States district court;

(2) signed pursuant to Fed. R. Civ. P. 11;

(3) containing a short and plain statement of the grounds for removal and copies of all process and pleadings served on defendant.

b. **Time to file.** the time limit for filing a notice of removal varies by the statute.

(1) **30 days after receipt (§§ 1441 and 1442).** Notice of removal under § 1441 or § 1442 must be filed within 30 days after receipt by defendant of the initial pleading (through service or otherwise). 28 U.S.C. § 1446(b). The 30-day time limit, while not generally considered jurisdictional, is strictly construed. Tech Hills II Assoc. v. Phoenix Home Life, 5 F.3d 963 (6th Cir. 1993).

(a) Service is not necessary. Receipt of a copy of a pleading could trigger the start of the 30 days.

(b) A case that is not removable may become removable later. The 30-day period begins whenever the case becomes removable. A diversity action, however, may not be removed more than one year after the original action was "commenced." 28 U.S.C. § 1446(b).

(2) **Before trial (immunity statutes).** Notice of removal under §

1442a, § 2679(d), § 1089, or § 1054 may be filed any time before trial.

c. **Notice constitutes removal.** Notice of the removal must be given to all parties, and the notice of removal must be filed in the state court. 28 U.S.C. § 1446(d). Filing the notice in the state court "effects removal" and precludes the state court from taking further action in the case. 28 U.S.C. § 1446(a).

d. **Changes from earlier law.** Amendments by Congress in 1988, 1990, and 1996 made certain changes to the statute that are separately mentioned here as a context for reading earlier case law.

(1) **1988:** A "notice of removal" (rather than a petition) is filed in the district court. (This recognizes that nothing is "petitioned," but, rather, removal is automatic.)

(2) **1988:** The attorney's signature replaces the old requirement of verification of the notice. (A signature of an attorney, which is subject to Fed. R. Civ. P. 11, is sufficient to deter abuse.)

(3) **1988:** The requirement that a bond be posted was eliminated. (If a case is remanded, a court may require the removing defendant to pay plaintiffs expenses, including attorney fees. 28 U.S.C. § 1447(c).)

(4) **1990:** Removal of separate state claims under § 1441(c) can only occur where the independent federal claim that is being removed invokes federal question jurisdiction. (Diversity jurisdiction is excluded from § 1441(c).)

(5) **1996:** The limitation of § 1442 to officers of the United States was removed and agencies may now (since 1996) remove cases in which they are defendants.

(6) **1996:** The requirement that motions to remand on procedural

grounds be filed within 30 days was expanded to cover all grounds other than lack of subject matter jurisdiction.

2. **Criminal Actions.**

a. **Time for removal.**

(1) **Section 1442.** Notice of removal under § 1442 must be filed 30 days after arraignment or before trial, whichever is earlier. The district court may upon a showing of good cause allow a later filing. 28 U.S.C. § 1446(c)(1).

(2) **Section 1442a.** Removal under § 1442a may be accomplished any time before trial.

b. **All grounds.** Notice must contain all grounds for removal. Failure to raise an available basis for removal results in waiver. 28 U.S.C. § 1446(c)(2).

c. **Federal defense.** Under Mesa v. California, 489 U.S. 121 (1989) a federal defense must be alleged.

d. **Actions by district court.**

(1) The district court must examine the notice promptly and dismiss if it is clear on the face of the notice that removal is not available. 28 U.S.C. § 1446(c)(4).

(2) If the notice is facially valid, the court must order a prompt evidentiary hearing to determine whether removal is warranted. 28 U.S.C. § 1446(c)(5).

(3) If removal is permitted, the district court must notify the state court. At this point state proceedings must stop. (During pendency of removal application the state may continue its process short of entering a judgment.)

e. **Standard.** The district court will dismiss the state law criminal action if (1) the federal agent was performing an act that was authorized by federal law, and (2) in performing the authorized act the federal agent did no more than what was necessary and proper for him to do. Kentucky v. Long, 837 F.2d 744 (6th Cir. 1988).

D. Disposition After Removal.

1. **Applicable law.** What law applies to the controversy after removal to federal court?

a. **Substantive.** Removal does not alter the underlying (substantive) law to be applied (state or federal). Arizona v. Manypenny, 451 U.S. 232 (1981).

b. **Procedural.** After removal federal procedures apply. RTC v. Northpark Joint Venture, 958 F.2d 1813 (5th Cir. 1992).

2. **State court orders.** All state court injunctions and orders remain in full force after removal. 28 U.S.C. § 1450. Federal law governs the orders procedurally. Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423 (1974). The court treats orders as if issued by the federal court (*i.e.*, it "federalizes" the order). As such they are subject to federal rules (including limits) and may be modified or vacated by the district court. Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300 (5th Cir. 1992).

3. **Motion to remand.** Since removal in a civil action is accomplished upon

filing the notice of removal in the federal court (with notice to the state court), challenge to removal is had by a motion to remand.

a. **Time to file.**

(1) **Procedural defect.** A motion to remand based on any defect other than subject matter jurisdiction must be filed within 30 days after the notice of removal is filed. 28 U.S.C. § 1447(c).

(2) **Jurisdictional defect.**

(a) A motion to remand based on subject matter jurisdiction may be filed any time before final judgment. 28 U.S.C. § 1447(c).

(b) The court must remand on motion or *sua sponte* if at any time before judgment it appears that removal was without subject matter jurisdiction. Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989).

b. **Discretion to remand.** The court has discretion to remand certain cases even outside the 30-day limit. Carnegie-Mellon Univ. v. Cahill, 484 U.S. 343 (1988) (remand of state law pendent jurisdiction claim is proper when the federal law claims have dropped out of the case).

c. **Discretion to deny joinder.** If a party seeks joinder in the federal court that would defeat diversity jurisdiction, the court may either deny joinder or grant it and remand. 28 U.S.C. § 1447(e); Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006 (3d Cir. 1987).

d. **State law matters.** Under 28 U.S.C. § 1441(c) (as amended in 1990) the court may remand "all matters" in which state law predominates, including, presumably, the entire case when § 1331 jurisdiction is

really secondary.

e. **No appeal of remand.** An order remanding a case to the state court from which it was removed is not reviewable by appeal or otherwise. 28 U.S.C. § 1447(d). A decision to remand on grounds that the case was removed without jurisdiction is "not subject to challenge ... by appeal, by mandamus, or otherwise". Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

(1) **Jurisdictional rule.** If the remand order contains the "magic words" that removal was without jurisdiction, the appellate court is without jurisdiction to review the order even if it is clearly erroneous. Severonickel v. Gaston Reymenants, 115 F.3d 65 (4th Cir. 1997); Richards v. Federated Dep't Stores, Inc., 812 F.2d 211 (5th Cir.) *cert. den.*, 484 U.S. 824 (1987). See also Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990) (contemporaneous collateral order was appealable).

(2) **Limited exception.** If the remand order affirmatively states a ground for remand other than jurisdiction, review by mandamus may be available. In the Matter of Shell Oil Co., 966 F.2d 1130 (7th Cir. 1992); Air-Shields v. Fullam, 891 F.2d 63 (3d Cir. 1989) (mandamus appropriate where district court acted outside 30-day limit on remand motions); New Orleans Pub. Serv., Inc. v. Majoue, 802 F.2d 166 (5th Cir. 1986).

(3) **Certification for appeal.** A district court in its discretion may certify a remand issue for interlocutory appeal. Defendant must seek certification under 28 U.S.C. § 1292(b).

III. REPRESENTATION ISSUES

Removal is only one of the procedural steps in representing the client. Full representation requires examining the sufficiency of the complaint in all respects.

A. Has the defendant been properly served in his individual capacity?

1. The method for service is that provided for under the law of the state in which the district court is located or in which service is effected or by delivering a copy of the summons and complaint to the individual personally, or to an agent authorized to receive service, or by leaving the summons and complaint at the individual's house or place of abode. Fed. R. Civ. P. 4(e)(2).

2. Fed. R. Civ. P 4(d) also permits the defendant to waive service within 30 days of a request by plaintiff (by first class mail with a copy of the complaint). A defendant who waives service gets 60 days to answer. A defendant who declines to waive service will be charged with the costs of personal service.

3. Fed. R. Civ. P. 4(i)(2) and 28 U.S.C. § 1391(e), provide for nationwide service on officers of the United States by registered or certified mail, in suits against such officers in their official capacities. Stafford v. Briggs, 444 U.S. 527 (1980).

4. In a lawsuit against the United States or an officer of the United States, the plaintiff must also serve the United States Attorney for the district in which the action is brought and the Attorney General, both by registered or certified mail (or delivery, in the case of the U.S. Attorney). Fed. R. Civ. P. 4(i)(1)(A) and (B). See Light v. Wolf, 816 F.2d 746 (D.C. Cir. 1987); Lawrence v. Acree, 79 F.R.D. 669 (D.D.C. 1978).

5. Fed. R. Civ. P. 4(m) requires service within 120 days after filing the complaint. After 120 days the court may dismiss the complaint as to any unserved defendant without prejudice or may extend the time if plaintiff shows good cause for the failure to serve.

B. Does the court have personal jurisdiction over the defendant?

1. If the defendant is not "present" in the forum state, does he have sufficient "minimum contacts" with the forum state to support the exercise of personal jurisdiction? International Shoe Co. v. Washington, 326 U.S. 310 (1945).

2. Does the state's long-arm statute reach the activities giving rise to the complaint? *See, e.g.*, Rufo v. Bastian-Blessing Co., 405 Pa. 12, 173 A.2d 123 (1961) (state long-arm statute did not extend to outer limits of due process.).

C. How much time does the defendant have to answer or otherwise plead? Under the December 1, 2001, changes to Fed.R.Civ.P. 12(a)(3)(B), Bivens defendants have 60 days to answer. In addition the December 1, 2001, changes to Fed.R.Civ.P. 4(i)(2)(B) require service upon the United States in addition to a Bivens defendant whenever such defendant is sued in an individual capacity.

D. Is venue proper? Unless provided otherwise by statute venue is proper only in a district in the state where all defendants reside, or where a substantial part of the claim arose. Special rules may apply in diversity and non-diversity cases and where defendant is an employee of the United States. 28 U.S.C. § 1391(a), (b), and (e), respectively.

E. What affirmative defenses are available that must be pleaded under Fed. R. Civ. P. 8(c)?

F. Does the defendant have an insurance policy that conditions coverage upon prompt notification and tender of the defense?

IV. CONCLUSION

Removal is a simple, almost automatic, procedure. Prompt attention to any state court action is essential, however, because time limits may be short. A thorough knowledge of the various removal statutes is necessary because an error that results in remand is final.

24TH FEDERAL LITIGATION COURSE

DEFENDING LAWSUITS ARISING FROM MILITARY OPERATIONS

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I. Introduction

A. Overview - military service materially different from civilian employment

1. Different rules govern
2. Emphasis on preserving good order and discipline of Armed Forces

B. Constitutional structure - Constitution grants exclusive responsibility for Armed Forces to legislative and executive branches. Courts have no role in governance of Armed Forces.

1. Congress shall have power to raise and support Armies;
2. to provide and maintain a Navy;
3. to make rules for the government and regulation of the land and naval forces (U.S. Const. art. I, § 8, cls. 12,13,14).
4. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States (U.S. Const. art. II , §2, cl. 1).

C. Types of claims arising from military service

1. FTCA
2. Individual capacity claims - *Bivens*; 42 U.S.C. § 1983
3. Statutory Claims - Title VII; ADA; ADEA, FLSA
4. State law claims - negligence

II. Representation Issues

A. Who Do We Represent

1. Representation governed by 28 C.F.R. § 50.15
   a. scope of employment
   b. interest of United States

B. Overview of Components of Armed Forces

1. Active-Duty Armed Forces - active duty military are always federal employees for representation purposes

a. 28 U.S.C. § 2671 - employee of the government includes members of the military or naval forces of the United States

b. Army, Navy, Air Force, Marine Corps, Coast Guard

c. Title 10 U.S.C. - Armed Forces

2. Reserves - Reservists are federal employees when in military status - Drill, Annual Training

a. Reserves: Army Reserve; Navy Reserve; Air Force Reserve; Marine Corps Reserve; Coast Guard Reserve

b. Governed by Title 10 U.S.C. - Armed Forces

3. National Guard - overview

a. National Guard is joint State/Federal military organization

I. Congress shall have power to provide for organizing, arming, and disciplining the Militia . . . reserving to the States respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress. U.S. Const. art. I, § 8, cl. 16.

ii. Title 32 U.S.C. National Guard

b. 54 Separate National Guards (50 states, D.C., Puerto Rico; Guam, U.S. Virgin Islands)

c. Army National Guard; Air National Guard

d. Established 1636 - oldest component of Armed Forces

C. National Guard Representation - Guard soldiers and airmen are federal employees except when performing State active duty.

1. 28 U.S.C. § 2671 - employee of the government includes members of the National Guard when engaged in training or duty under section 115, 316, 502, 503, 504, 505 of Title 32.

2. Historic - *Maryland v. United States (ex rel Levin)*, 381 U.S. 41, 53 (1965) - Supreme Court holds that National Guard soldiers are State not federal employees for FTCA purposes.

3. 1981 Amendment to Federal Tor Claims Act, PL 97-124, December 20, 1981, 95 Stat. 1666 - Congress legislatively overrules holding in *Maryland* by amending FTCA's definition of federal employee (28 U.S.C. § 2671) to specifically include National

Guard soldiers when engaged in training or duty under Title 32.

a. Legislative history shows Congress's recognition that "there is substantial risk of personal liability by National Guard personnel engaged in federal training activity." H.R. Rep. 97-384, 1981 U.S.C.C.A.N 2692. Intent of amendment was to provide the National Guard the same coverage that exists for the active Armed Forces and its other reserve components.

b. § 2671 definition of federal employee controls for representation purposes.

c. Enumerated 32 U.S.C. sections cover all National Guard military training except State active duty.

I. 32 U.S.C. § 502 - Weekend Drill
ii. 32 U.S.C. § 503 - Annual Training
iii.32 U.S.C. § 505 - Schools

4. National Guard Technicians - Full-time Federal employees assigned to State military departments who are required to maintain membership in the National Guard as a condition of their federal employment.

a. National Guard Technicians Act of 1968 - 32 U.S.C. § 709

I. Technicians are employees of the United States - 32 U.S.C. § 709 (e)

5. Active Guard Reserve (AGR) - full-time Title 32 active-duty members of National Guard.

III. Intramilitary Immunity

A. *Feres v. United States*, 340 U.S. 135, 138 (1950).

1. 3 consolidated negligence claims against United States - barracks fire, 2 medical malpractice claims.

2. 28 U.S.C. § 1346(b) - facially broad waiver of sovereign immunity.

3. 28 U.S.C. § 2671 - contemplates that U.S. will sometimes be responsible for negligence of military personnel by including members of military and naval forces in FTCA's definition of federal employees.

4. 28 U.S.C. § 2680(j) - FTCA exception for "any claim arising from the combatant activities of the military or naval forces or the Coast guard during time of war."

5. 28 U.S.C. § 2674 - private party analogue - United States shall be

liable to the same extent as a private individual under like circumstances.

b. No private party analogue to soldier - no American law has ever permitted a soldier to recover for negligence against either his superior officers or the government he serves.

I. FTCA intended to waive sovereign immunity for recognized causes of action and was not intended to visit the government with novel and unprecedented liabilities.

6. Relationship between the Government and members of its Armed Forces is distinctively federal in character.

7. Availability of uniform system of compensation for injury or death arising from military service.

8. Incident to military service test - Supreme Court holds that the FTCA did not waive sovereign immunity for injuries to soldiers where the injuries "arise out of or are in the course of activity incident to service." 340 U.S. at 141-142.

B. *Feres* Progeny

1. *United States v. Shearer*, 473 U.S. 52 (1985) - off-base murder of private by another soldier. Mother alleges negligence by Army in supervision of murderer.

a. "*Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty." *Shearer*, 473 U.S. 52, 57 (1985) (internal quotation marks and citations omitted).

b. Situs of injury not nearly as important as whether the suit requires the civilian court to second-guess military decisions and whether the suit might impair essential military discipline. *Id.* at 57.

c. Bars claims of the *type* that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

2. *Stencel Aero v. United States*, 431 U.S. 666 (1977) - National Guard pilot injured when ejecting from F-100 fighter aircraft sues manufacturer of ejection seat. Manufacturer brings cross-claim for indemnification against United States.

a. Held - third party indemnification action barred when direct action by soldier barred.

b. Reasoning - where case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. At issue would be the degree of fault on the part of the Government's agents and the effect upon the service member's safety. 431 U.S. at 673.

c. Key point - trial would, in either case, involve second-guessing military orders and would often require members of the Armed Services to testify in court as to each other's decisions and action. *Id.*

3. *United States v. Johnson*, 481 U.S. 681 (1987) - Coast Guard helicopter crashes during rescue mission killing all on board due to alleged negligence of civilian FAA air traffic controllers.

a. Held - *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service related injuries. Military status of alleged tortfeasor immaterial to application of doctrine. 481 U.S. at 687-88.

b. Reasoning- In 40 years since *Feres* decision Court has never deviated from the standard that soldiers cannot bring tort suits against the Government for injuries that "arise out of or are in the course of activity incident to service." *Id.* Congress has not changed standard despite ample opportunity.

c. Key Points - *Johnson* reaffirms continued vitality of all three grounds supporting intramilitary immunity. Court emphasizes that because injury arose during performance of military duty, "the potential that this suit could implicate military discipline is substantial." 481 U.S. at 691-92.

I. Scalia dissent.

B. *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) - *Bivens* suit by Navy enlisted sailors against their commander, superiors officers, and NCO's alleging racial discrimination in duty assignments, performance evaluations, and disciplinary actions.

1. Individual capacity suit - generally look to military status of both plaintiff and defendant

2. Explicit recognition that *Feres* guides analysis in *Bivens* suit arising from military service although United States not a party. 462 U.S. at 299.

a. The special status of the military has required, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by

enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in *Feres*, we must be concerned with the disruption of the peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court. 462 U.S. at 303-04 (internal citations and quotation marks omitted).

3. Holding - taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted personnel a *Bivens*-type remedy against their superior officers. Id. at 304.

C. *United States v. Stanley*, 483 U.S. 669, 679-84 (1987) - soldier unwittingly subjected to secret LSD experiment brings *Bivens* claims against known and unknown individual defendants.

1. Court explicitly adopts arising from or incident to military service test as controlling in *Bivens* as well as FTCA actions.

a. We see no reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits.

b. Officer-subordinate relationship present in *Chappell* not necessary for application of intramilitary immunity.

2. Key Point - A test for liability that depends on the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision making), the mere process of arriving at correct conclusions would disrupt the military regime. 483 U.S. at 682-83.

a. The arising from or incident to military service test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters. *Id.* at 683.

IV. Nonjusticiable Military Issues

A. *Orloff v. Willoughby*, 345 U.S. 83 (1953) - *Habeas Corpus* petition filed by physician drafted in doctor's draft who was denied commission in Medical Corps and instead assigned duties as private in medical lab because he refused to answer questions concerning Communist affiliations.

1. Military appointments not subject to judicial review - the commissioning of officers in the army is a matter of discretion within the province of the President as Commander in Chief. "Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission." 345 U.S. at 92.

2. Duty assignments not subject to judicial review - "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere in legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." 345 U.S. at 94.

B. *Gilligan v. Morgan*, 413 U.S. 1 (1973) - Complaint for declaratory and injunctive relief filed by Kent State University students seeking judicial evaluation of appropriateness of the training and weaponry of the Ohio National Guard and judicial supervision of future training and operations of National Guard.

1. Training, supervision, organization, equipping, and employment of Armed Forces nonjusticiable.

2. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war.

3. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." 413 U.S. at 10.

C. *Aktepe v. United States*, 105 F.3d 1400, 1402-04 (11th Cir. 1997) - accidental firing of two live missiles from a United States Navy warship during a North Atlantic Treaty Organization (NATO) training exercise. The missiles struck a Turkish Navy warship resulting in several deaths and numerous injuries. *Id*. at 1402. The survivors of the Turkish sailors killed and wounded in the training accident filed wrongful death and personal injury claims against the United States under the Public Vessels Act, 46 U.S.C. App. §§ 781-790, and the Death on the High Seas Act, 46 U.S.C. App. §§ 761-768. .

1. Relying in large part upon *Gilligan*, the Eleventh Circuit holds that these tort claims present nonjusticiable political questions. *Aktepe*, 105 F.3d at 1402-04.

V. Remedial Statutes Generally Do Not Apply to Armed Forces

A. Absent an express directive from Congress, statutory remedies of general application such as Title VII, the Americans with Disabilities Act (ADA), 42 U.S.C. § 1201 *et seq*., and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, do not apply to uniformed members of the Armed Forces.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., does not apply to uniformed members of the Armed Forces. *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997); *Kawitt v. United States*, 842 F.2d 951, 953 (7th Cir. 1988); *Hupp v. Department of the Army*, 144 F.3d 1144, 1147 (8th Cir. 1998); *Frey v. California*, 982 F.2d 399, 404 (9th Cir. 1993); *Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987).

2. ADA and ADEA do not apply to uniformed members of the Armed Forces. *Coffman v Michigan*, 120 F.3d 57, (6th Cir. 1997)(holding that Title VII, the Rehabilitation Act, and the ADA do not apply to National Guard soldiers); *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991)(holding that Title VII and ADEA do not apply to uniformed members of the Armed Forces).

2. Bar applies to applicants for military positions as well as current members of Armed Forces.

a. *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991), - unsuccessful applicant for a commission in the United States Navy brought Title VII and ADEA claims. The Second Circuit held that "Spain was applying for an officer position with the Navy, a uniformed position. Accordingly, he cannot allege any facts sufficient to support a Title VII claim . . . and his claims should therefore have been dismissed with prejudice." *Id*. *See also, Johnson v. Alexander*, 572 F.2d 1219, 1222-24 (8th Cir. 1978)(holding that "neither Title VII or its standards are applicable to persons who enlist or apply for enlistment in any of the Armed Forces of the United States); *Moore v. Pennsylvania Department of Military and Veterans Affairs*, 216 F.Supp.2d. 446, 452 (E.D. Pa. 2002)(holding that "Title VII provides the same immunity from suit by enlisted personnel or applicants for enlistment in the National Guard that is provided to federal armed forces.)"

VI. 42 U.S.C. § 1983 Claims Against National Guard Soldiers

A. The Circuit Courts have unanimously applied the doctrine of intramilitary immunity to bar all service-related § 1983 claims against National Guard officers. *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 51 (2nd Cir. 1999) (collecting cases); *Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993); *Jorden v. National Guard Bureau*, 799 F.2d 99, 106-108 (3rd Cir. 1986); *Holdiness v. Stroud*, 808 F.2d 417, 423 (5th Cir. 1987); *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 770 (7th Cir. 1993); *Uhl v. Swanstrom*, 79 F.3d 751, 755-56 (8th Cir. 1996); *Wood v. United States*, 968 F.2d 738, 739 (8th Cir.

1992); *Bowen v. Oistead*, 125 F.3d 800, 804-05 (9th Cir. 1997); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984).

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24TH FEDERAL LITIGATION COURSE

PLEADINGS AND MOTION PRACTICE

I. INTRODUCTION.

A. Background.

B. Purpose of the Federal Rules of Civil Procedure.

II. PAPER MANAGEMENT IN THE FEDERAL COURTS.

A. Pleadings, Motions, and Other Papers.

1. Pleadings. Fed. R. Civ. P. 7(a).

a. "Pleadings" are limited to the complaint, answer, reply to a counterclaim, answer to a crossclaim, third-party complaint, and third-party answer.

b. No other "pleadings" are allowed, except the court can order a reply to an answer or a third-party answer.

c. All of the above can be considered under the general heading of complaint, answer, and reply.

d. Definition becomes important when taken in context of other rules. E.g., Fed. R. Civ. P. 12(c) which provides for judgment on the pleadings; Fed. R. Civ. P. 15(a) which allows a party to amend once as of right any time before a responsive pleading is served.

2. Motions and other papers. Fed. R. Civ. P. 7(b).

a. A motion is an application to the court for an order.

b. Must be in writing (unless made during a hearing or trial), must state with particularity the grounds, and must set forth the relief or order sought.

c. Fed. R. Civ. P. 7(b)(2) provides that the rules as to caption and other matters of form apply to motions and other papers.

d. Local court rules may substantially impact motion practice by limiting number of pages, setting time requirements for notice, response, etc.

B. Signing Pleadings, Motions, and Other Papers. Fed. R. Civ. P. 11.

1. Background.

a. Prior to 1 August 1983, the signature of an attorney on a pleading or motion certified that to the best of the signer's belief "there is good ground to support it."

b. Whether a particular document was signed in violation of Rule 11 required the court to conduct a subjective inquiry into the lawyer's knowledge and motivation for signing. "Good faith" was a defense, and sanctions were imposed only upon a determination that the lawyer acted willfully or in bad faith.

c. Sanctions were seldom imposed, and frivolous pleadings that caused delay and increased the cost of litigation were becoming more numerous. In 1983, Rule 11 was amended to address these problems.

d. The 1993 amendments to the rule were intended to remedy problems that arose in interpretation of the rule but retained the principle that attorneys and *pro se* litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1 to “secure the just, speedy, and inexpensive determination of every action.”

2. Requirements of Rule 11.

a. Every pleading, motion, or other paper shall be signed by an attorney of record. If the party is not represented by an attorney, the party must sign.

b. Signature certifies that:

(1) the person signing has read the document [While not expressly stated in the rule, the obligations imposed by the rule obviously require that a signer first read the document.];

(2) to the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact (has or is likely to have evidentiary support) and is warranted by existing law or a good faith (non-frivolous) argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

c. Current rule imposes an objective standard by which to measure the actions of the litigants. "Simply put, subjective good faith no longer provides the safe harbor it once did." Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). Accord Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997); F.D.I.C. v. Calhoun, 34 F.3d 1291 (5th Cir. 1994); Pacific Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113 (7th Cir. 1994); Blackhills Institute of Geological Research v. South Dakota School of Mines and Technology, 12 F.3d 737 (8th Cir. 1993); Paganucci v. New York, 993 F.2d 310 (2d Cir. 1993) (The standard is whether a reasonably competent attorney would have acted similarly.).

d. Whether the required inquiry into the law and the facts of the case is "reasonable" will depend upon the facts and circumstances of the particular case. The following factors have been considered by the courts to determine the appropriateness of the presignature inquiry:

(1) As to the facts:

(a) the time available for investigation;

(b) the extent of the attorney's reliance upon the client for the factual basis of the document;

(c) the feasibility of a prefiling investigation;

(d) whether the attorney accepted the case on referral from another attorney;

(e) the complexity of the issues; and

(f) the extent to which development of the facts underlying the claim requires discovery.

Childs v. State Farm Mutual Automobile Insurance Co., 29 F.3d 1018, 1026 (5th Cir. 1994).

(2) As to the law:

(a) the time available to prepare the document before filing;

(b) the plausibility of the legal view contained in the document;

(c) whether the litigant is pro se; and

(d) the complexity of the legal issues involved.

Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 875-76 (5th Cir. 1988). See, e.g., Rode v. United States, 812 F.Supp. 45 (M.D. Pa. 1992)(Rule 11 sanctions not imposed against plaintiff's counsel in FTCA suit against U.S. where plaintiff's counsel cited court opinions, albeit from districts outside circuit, in support of more liberal approach to construing jurisdictional prerequisites to FTCA action). Cf. Knipe v. United States, 151 F.R.D. 24 (N.D.N.Y. 1993)(FTCA action against FAA raised frivolous arguments and was brought for improper purpose, warranting imposition of Rule 11 sanctions on plaintiff's attorney).

e. The courts *were* split on whether compliance is measured at the time the document is signed and filed or if there is a continuing duty to amend when additional information reveals that the claim is frivolous or that the allegations are unsupported. Compare Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988) (no continuing duty); with Kale v. Combined Ins. Co. of America, 861 F.2d 746 (1st Cir. 1988) (continuing duty). The 1993 amendments to the rule make clear that although a formal amendment to pleadings may not be required, Rule 11 is violated by continuing to assert ("later advocating") claim or defense after learning that it has no merit.

3. Sanctions for Violations of Rule 11.

a. "If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11] has been violated, the court may…impose an appropriate sanction upon the attorneys, law firms, or parties that have violated [the rule]." Fed. R. Civ. P. 11(c).

b. Sanctions can be imposed upon the attorneys, the law firms, or the parties that have violated the rule or who are responsible for the violation. (Usually the person signing, filing, submitting or advocating a document.) **"**Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Fed. R. Civ. P. 11(c)(1)(A). Sanctions may be imposed upon pro se litigants who violate Rule 11, although the court should consider plaintiff's pro se status in determining whether the filing in question was reasonable. Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988); Brown v. Consolidated Freightway, 152 F.R.D. 656 (N.D. Ga. 1993). Cf. Clark v. Green, 814 F.2d 221 (5th Cir. 1987) (imposing sanctions under Rule 38 of Fed. R. App. P. against pro se litigant for totally frivolous appeal).

c. Sanctions may include: striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other education programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. Also, the Court may award reasonable expenses and attorney's fees to the prevailing party. See Blue v. U.S. Dept. of Army, 914 F.2d 525 (4th Cir. 1990)(government awarded costs and attorneys' fees for plaintiff's bad faith pursuit of employment discrimination action), cert. denied 499 U.S. 959 (1991).

d. Compensatory awards should be limited to unusual circumstances. Non-monetary sanctions are proper and suggested. Sanctions are "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). See Sato v. Plunkett, 154 F.R.D. 189 (N.D. Ill. 1994).

e. Safe harbor provision: Motion for sanctions shall be made and served separately and may be filed with the court only if the challenged paper, claim, or defense is not withdrawn or corrected within 21 days after service. Fed. R. Civ. P. 11(c)(1)(A).

f. Ordinarily a motion for sanctions should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. See Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC, 339 F.3d 1146 (9th Cir. 2003)(sanctions award precluded because motion was served after complaint had been dismissed and the period within which an amended complaint could be filed had expired).

g. Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by the rule.

4. Rule 11 does not apply to discovery. Fed. R. Civ. P. 11(d). However, Rules 26(g) and 37 establish similar certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions.

C. Commencing the Action.

1. "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

2. "Filing" is accomplished by complying with local rules as to delivery of the requisite number of copies of the complaint to the clerk of court's office and having the complaint logged into the court's docket file. A pleading, motion, or other paper is not "filed" until received by the clerk; depositing a document in the mail is not "filing." Cooper v. Ashland, 871 F.2d 104 (9th Cir. 1989); Torras Herreria v. M/V Timur Star, 803 F.2d 215 (6th Cir. 1986).

3. Under federal question jurisdiction, the statute of limitations is tolled by the filing of the complaint with the court. West v. Conrail, 481 U.S. 35 (1987); Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). If jurisdiction is based upon diversity of citizenship and the state statute specifies that the period of limitations is tolled only upon service of process, the state rule will apply. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

D. Service of Process.

1. "Upon or after the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant." Fed. R. Civ. P. 4(b).

2. The summons is signed by the clerk, under the seal of the court. It should set out the name of the parties, the name of the court, and the name and address of the plaintiff or his attorney, if represented. It also should state the time within which the defendant must appear and defend, and warns that failure to respond in a timely fashion will result in default. See Fed. R. Civ. P. 4(a).

3. If the plaintiff fails to serve the summons and complaint within 120 days of commencing the action, the court "shall" (upon motion or on its own initiative) dismiss the action without prejudice or direct that service be effected within a specified time unless plaintiff can show good cause why service was not made within the period specified. Fed. R. Civ. P. 4(m). Momah v. Albert Einstein Medical Center, 158 F.R.D. 66 (E.D. Pa. 1994); See also Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987); Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987). Ignorance of Rule 4(m) by pro se litigants does not excuse their failure to serve within 120 days. Lowe v. Hart, 157 F.R.D. 550 (M.D. Fla. 1994).

4. Serving the United States.

   a. Pursuant to Rule 4(i)(1), service on the United States shall be effected:

      (1) By delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or to an Assistant United States Attorney or designated clerical employee, or by sending a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney; and,

      (2) By also sending a copy of the summons and complaint by registered or certified mail to the Attorney General in Washington; and,

(3) If attacking the validity of an order of an officer or agency of the United States not made a party, by sending a copy of the summons and complaint by registered or certified mail to such officer or agency.

b. Note that the waiver of service provisions of Rule 4(d), discussed below, are not applicable to the United States as a defendant.

5. Pursuant to Rule 4(i)(2)(A), service on an officer (in his or her official capacity only) or an agency of the United States shall be effected:

a. By serving the United States (meaning service on the U.S. Attorney and the Attorney General as discussed above); and,

b. By sending a copy of the summons and complaint by registered or certified mail to the named officer or agency. Service beyond the territorial limits of the forum state may be authorized by 28 U.S.C. § 1391(e).

c. Note that the waiver of service provisions of Rule 4(d), discussed below, are not applicable to United States officers or agencies.

d. The court shall allow a plaintiff who fails to effect service properly on a United States agency or officer served in his/her official capacity a “reasonable time" to cure defects in service, provided plaintiff has effected service on either the U.S. Attorney or the Attorney General. Fed. R. Civ. P. 4(i)(3)(A).

6. Pursuant to Rule 4(i)(2)(B), service on an officer or an employee of the United States (in his or her individual capacity – whether or not the officer or employee is sued also in an official capacity) for “acts or omissions occurring in connection with the performance of duties on behalf of the United States” shall be effected:

a. By serving the United States (meaning service on the U.S. Attorney and the Attorney General as discussed above); and,

b. By serving the officer or employee in the manner prescribed by Rule 4 (d), (e), (f), or (g).

c. Note that the waiver of service provisions of Rule 4(d), discussed below, **do** apply.

d. Includes former employees.

e. The court shall allow a plaintiff who fails to effect service properly on the United States "reasonable time" to cure defects in service required by Rule 4(i)(2)(B), provided plaintiff has effected service on the officer or employee of the United States sued in an individual capacity. Fed. R. Civ. P. 4(i)(3)(B).

7. Service on an individual defendant.

a. Service upon individuals within a judicial district of the United States is effected:

(1) By delivering a copy of the summons and complaint to him/her personally or by leaving copies at his/her house or usual place of abode with some person of suitable age and discretion who also resides at the house or by delivering copies to an agent authorized by appointment or by law to receive service of process (Fed. R. Civ. P. 4(e)(2)); or,

(2) By serving the defendant in accordance with the law of the state wherein the district court sits. Fed. R. Civ. P. 4(e)(1); or,

(3) By obtaining the defendant's waiver of service as specified in Rule 4(d).

b. Service upon individuals in a foreign country is effected:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (entered into force for the United States on February 10, 1969); or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service (provided that such method of service is reasonably calculated to give notice):

(a) in the manner prescribed by the law of the foreign country for service in that country;

(b) as directed by a foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by law of the foreign country, by delivery to the individual personally, or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served (Fed. R. Civ. P. 4(f)(2)); or

(3) By other means not prohibited by international agreement as may be directed by the court. Fed. R. Civ. P. 4(f)(3).

(4) Service may also be effected by obtaining the defendant's waiver of service as specified in Rule 4(d).

c. Waiver of service. Fed. R. Civ. P. 4(d).

(1) Plaintiff sends notice, request for waiver and copy of the complaint by reliable means, along with an extra copy and a prepaid means of compliance. Must allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent (60 days if the defendant is outside the United States).

(2) Defendant bears costs for effecting formal service unless "good cause" shown for failure to consent to waiver.

(3) A defendant that waives formal service is entitled to 60 days after request for waiver sent to answer the

complaint (90 days if the defendant is outside the United States).

8. Service of process on the installation.

a. Commanders and officials will not evade service of process in actions brought against the U.S. or themselves concerning official duties. Reasonable restriction on the service of process on the installation may be imposed.

b. If acceptance of service would interfere with duty--appoint agent or representative to accept service.

III. COMPLAINT AND ANSWER.

A. Complaint.

1. Format.

a. "Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a)." Fed. R. Civ. P. 10(a).

b. The caption of the complaint must contain the names of all parties; subsequent pleadings need only contain the name of the first party on each side with appropriate indication of other parties (such as “et al.”). Fed. R. Civ. P. 10(a).

c. Averments must be set forth in separate numbered paragraphs. Claims founded upon separate transactions or occurrences should be set forth in separate counts. Fed. R. Civ. P. 10(b).

2. Contents. Fed. R. Civ. P. 8(a).

a. A short and plain statement of the grounds upon which the court's jurisdiction is based.

b. A short and plain statement of the claim showing that the pleader is entitled to the relief sought.

c. A demand for judgment for the relief the plaintiff deems himself entitled. Alternative and various types of relief may be demanded in the same complaint.

d. Courts may liberally construe the pleadings of *pro se* litigants.

B. Answer.

1. Format. Fed. R. Civ. P. 10.

2. Contents. Fed. R. Civ. P. 8(b)&(c).

a. "A party shall state in short and plain terms his defenses to each claim asserted. . . ." Fed. R. Civ. P. 8(b).

(1) Rule 8(c) sets forth those defenses that must be pled affirmatively.

(2) Under Rule 10(b) each affirmative defense should be set forth in a separate numbered paragraph.

(3) If you fail to plead an affirmative defense, it *may* be waived. Compare Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990)(failure of United States to affirmatively plead as a defense to an FTCA action the Louisiana Medical Malpractice Act limitation on damages resulted in waiver of that defense) with Owen v. U.S., 935 F.2d 734 (5th Cir. 1991)(fact that U.S. pled the cap and specifically noted it in pre-trial order distinguishes Simon).

(4) But the "technical" failure to plead an affirmative defense may not be fatal. See Blaney v. United States, 34 F.3d 509, 512 (7th Cir. 1994)(Air Force's failure to plead statute of limitations as an affirmative defense in answer did not constitute a waiver of the matter where the Air Force raised the issue in a motion to dismiss and the district court chose to recognize the defense). Cf. Harris v. Secretary, Dep't of Veterans Affairs, 126 F.3d 339, 345 (D.C. Cir. 1997)(holding that a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion).

(5) The defendant may seek leave to amend, pursuant to Rule 15(a), to add an affirmative defense. Such leave should be freely granted when the interests of justice so require. See Phyfer v. San Gabriel Development Corp., 884 F.2d 235, 241 (5th Cir. 1989)(district court properly granted leave to amend answer to add affirmative defense of collateral estoppel where there was no unfair surprise to the plaintiff). See also Sanders v. Dep't of the Army, 981 F.2d 990, 991 (8th Cir. 1992)(district court did not abuse its discretion in allowing government to raise statute of limitations in motion to dismiss filed two months after its answer, when, *inter alia*, the court properly granted government leave to amend its answer to expressly include the omitted limitations defense).

b. "A party…shall admit or deny the averments upon which the adverse party relies." Fed. R. Civ. P. 8(b).

(1) Must admit or deny each allegation of the complaint. May deny specific allegations of specific paragraphs and admit the remainder, or may make general denial with specific admissions. For example:

- "Paragraph #__ is admitted."
- "Admitted that ____. Denied that _____.
- "The first sentence of paragraph #__ is admitted. The remainder of paragraph #__ is denied."
- #__. Admitted.
- "Plaintiff admits that _____ and denies that _____."

(2) Failure to deny constitutes an admission.

(3) If pleader is without knowledge or information sufficient to form a belief as to the truth of an allegation, he can so state in his answer and it will have the effect of a denial.

(4) Can enter a general denial to all the allegations of the complaint, BUT, consider Rule 11.

3. Time to answer.

a. Government and official capacity defendants have 60 days to answer; private defendant has 20 days. Fed. R. Civ. P. 12(a). Government employee sued for acts or omissions occurring in connection with the performance of duties on behalf of the United States have 60 days to answer, counting from later of: service on officer or employee, or service on the United States attorney. Fed. R. Civ. P. 12(a). If service of summons is waived under Rule 4(d), then 60 days after request for waiver. Id.

b. A motion served under Rule 12 enlarges the time to answer until ten days after notice of the court's action on the motion (unless a different time is fixed by court order). Fed. R. Civ. P. 12(a)(4).

IV. MOTION PRACTICE.

A. General.

B. Motion to Dismiss. Fed. R. Civ. P. 12(b).

1. Federal courts simply require notice pleading and must construe pleadings liberally in ruling on motions to dismiss. Clorox v. Chromium Corp., 158 F.R.D. 120 (N.D. Ill. 1994) (citing, inter alia, Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993)).

2. Lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).

a. Except for Supreme Court's original jurisdiction, federal judicial power is dependent upon a statutory grant of jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1992); Stevenson v. Fain, 195 U.S. 165, 167 (1904).

b. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936).

c. Lack of jurisdiction over the subject matter cannot be waived and can be raised for the first time on appeal. In fact, any court considering a case has a duty to raise the issue sua sponte if it appears that subject matter jurisdiction is lacking. Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988).

d. A "facial attack" on the court's jurisdiction goes to whether the plaintiff has properly alleged a basis of subject matter jurisdiction. A "factual attack" challenges the existence of subject matter jurisdiction in fact, regardless of the allegations in the complaint. Matter outside the complaint may be considered by the court in resolving the issue. See, e.g., Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981); Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir.), cert. denied, 449 U.S. 953 (1980).

e. Considering matters outside the pleadings does not convert a motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment and the dismissal is not an adjudication on the merits. Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987); Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981). But cf. Sutton v. United States, 819 F.2d 1289, 1299 (5th Cir. 1987) (when determination of waiver of sovereign immunity requires factual development, court should permit limited discovery and require parties to submit the issue by summary judgment rather than by a motion to dismiss). Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S 986 (1987) (when subject matter jurisdiction is intertwined with the underlying claim, the issue should be resolved under Rule 12(b)(6) or Rule 56).

f. Sovereign Immunity.[1]

(1) The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit. United

[1] May also be asserted as failure to state a claim under Rule 12(b)(6).

States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

(2) With regard to the sovereign immunity of officials and agencies of the United States, as opposed to the United States itself, the general rule is that the suit is, in effect, a suit against the United States when the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or compel it to act. Dugan v. Rank, 372 U.S. 609, 620 (1963).

(3) In suits against federal officials for money damages directly under the Constitution (Bivens suits), the principle of sovereign immunity does not apply, since the suit is against the federal official personally (i.e., in his individual capacity as opposed to his official capacity.)

(4) Commonly asserted provisions that waive sovereign immunity:

- The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).
- The Federal Tort Claims Act, 28 U.S.C. § 1346(b).
- The Freedom of Information Act, 5 U.S.C. § 552.
- The Privacy Act, 5 U.S.C. § 552a.
- The Unjust Conviction Act, 28 U.S.C. §§ 2513, 1495.
- The Equal Access to Justice Act, 28 U.S.C. § 2412(b) & (d); 5 U.S.C. § 504.
- The Civil Rights Act of 1991.
- The Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq. However, the APA does not contain a specific jurisdictional grant. 28 U.S.C. § 1331 (federal question jurisdiction) can

furnish the basis for a suit under the APA. See Califono v. Sanders, 430 U.S. 99 (1977); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir. 1985).

(5) Commonly asserted provisions that *do not* waive sovereign immunity for monetary relief:

- The federal question jurisdiction statute, 28 U.S.C. § 1331. See, e.g., Gilbert v. Dagrossa, 756 F.2d 1455 (9th Cir. 1985).
- The commerce and trade regulation statute, 28 U.S.C. § 1337. See, e.g., Hagemeier v. Block, 806 F.2d 197 (8th Cir. 1986), cert. denied, 481 U.S. 1054 (1987).
- The civil rights jurisdiction statute, 28 U.S.C. § 1343. See, e.g., Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).
- The mandamus statute, 28 U.S.C. § 1361. See, e.g., Doe v. Civiletti, 635 F.2d 88 (2d Cir. 1980).
- The Declaratory Judgment Act, 28 U.S.C. § 2201-02. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952); Mitchell v. Ridell, 402 F.2d 842 (9th Cir. 1968).
- The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

(6) Any waiver of sovereign immunity must be strictly construed in favor of the United States.

(7) Congressional conditions on waivers of sovereign immunity are jurisdictional prerequisites to suit. United States v. Dalm, 494 U.S. 596 (1990); Block v. North Dakota, 461 U.S. 273 (1983); Lehman v. Nakshian, 453 U.S. 156 (1981); United States v. Kubrick, 444 U.S. 111 (1979). However, see Irwin v. Veterans Administration, 498 U.S. 89 (1990), which held that the 30-day requirement for filing suit in an EEO case against the government can be equitably tolled.

g. Failure to Exhaust Administrative Remedies.[2]

(1) Statutory Exhaustion Requirement. When the statute itself specifically requires exhaustion of administrative remedies prior to bringing a judicial action, then exhaustion is mandatory. McCarthy v. Madigan, 503 U.S. 140 (1992). Examples:

- Presentation of a Federal Tort Claim to the administrative agency. 28 U.S.C. § 2675.
- Administrative processing of a Title VII complaint of discrimination. 42 U.S.C. § 2000e-16(c).
- Administrative claims for social security disability. 42 U.S.C. § 405(g).

(2) Judicially Mandated Exhaustion. If there is no statute which establishes an administrative remedy, or if the statute does not clearly mandate exhaustion, the court may balance the various factors set out in McCarthy v. Madigan, *supra*, to determine whether administrative exhaustion required. The court will not require exhaustion when the interests of the individual in retaining prompt access outweighs the institutional interests favoring exhaustion, or when undue prejudice exists to the subsequent assertion of court action, such as when there is an unreasonable or indefinite time frame for administrative action, or the administrative remedy is inadequate, or the administrative body is shown to be biased or to have predetermined the issue.

(3) When judicial review of an agency decision is sought under the APA, and the statute or agency rules do not require exhaustion, no judicially-created exhaustion requirement can be imposed. See Darby v. Cisneros, 509 U.S. 137 (1993). See also 5 U.S.C. § 704. But, Darby may have limited applicability to the military. See Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994) (holding that "review of military personnel actions . . . is a unique context with specialized rules limiting judicial

[2] May also be asserted as failure to state a claim under Rule 12(b)(6).

review," and citing Chappell v. Wallace, 462 U.S. 486 (1983)). In some circuits, the military services may continue to assert the exhaustion doctrine as a defense, seeking to distinguish Darby--which was not a military case. See E. Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros*, 166 Mil. L. Rev. 67 (2000)(arguing that *Darby* is inapplicable to military claims). But see Crane v. Sec'y of Army, 92 F.Supp.2d 155, 161 (W.D. N.Y. 2000)("Almost without exception, federal courts throughout this country have also declined to create a military exception to the Court's decision in Darby.").

(4) What remedies must be exhausted?

- Boards for Correction of Military Records. 10 U.S.C. § 1552.
- Discharge Review Boards. 10 U.S.C. § 1553.
- Article 138, UCMJ. 10 U.S.C. § 938.
- Clemency Boards. 10 U.S.C. §§ 874, 951-954.
- Inspector General. 10 U.S.C. § 3039.

(5) Exceptions to the exhaustion doctrine:

- Inadequacy. Von Hoffburg v. United States, 615 F.2d 633 (5th Cir. 1980).
- Futility. Compare Watkins v. United States Army, 541 F.Supp. 249 (W.D. Wash. 1982) and Steffan v. Cheney, 733 F.Supp. 115 (D..D.C. 1989) with Schaefer v. Cheney, 725 F.Supp. 40 (D.D.C. 1989).
- Irreparable injury. Hickey v. Commandant, 461 F.Supp. 1085 (E.D. Pa. 1978).
- Purely legal issues. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).
- Avoiding piecemeal relief. Walters v. Secretary of the Navy, 533 F.Supp. 1068 (D.D.C. 1982),

rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983).

(6) Example of Rule 12(b)(1) motion in DoD litigation: Hoery v. United States, 324 F.3d 1220 (10th Cir. 2003)(reversing district court's order granting government's motion to dismiss for lack of subject matter jurisdiction, and holding that landowner's cause of action under FTCA continued to accrue, for limitations purposes, until removal of toxic chemicals was accomplished).

h. Standing.[3]

(1) The standing inquiry has constitutional, statutory, and judicially formulated components. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)(standing subsumes a blend of constitutional requirements and prudential considerations).

(2) In the constitutional sense, Article III requires that a plaintiff have suffered an injury which is redressable by the court. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). An asserted right to have the government act in accordance with the law does not confer standing. Allen v. Wright, 468 U.S. 737 (1984); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1978).

[3] Sometimes asserted as failure to state a claim under Rule 12(b)(6), but more properly brought as Rule 12(b)(1) motion. See Lipsman v. Secretary of the Army, 257 F.Supp.2d 3, 5 (D.D.C. 2003)("A challenge to the standing of a party, when raised as a motion to dismiss, proceeds pursuant to Rule 12(b)(1).")

(3) In general, in order for the plaintiff to have standing, the plaintiff must show that the challenged action has caused him injury in fact (that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant), and that the interest sought to be protected by him is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Meese v. Keene, 481 U.S. 465 (1987); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970).

(4) A plaintiff may not claim standing to vindicate the constitutional rights of third parties. Tileston v. Ullman, 318 U.S. 44 (1943). A plaintiff may only challenge a statute or regulation in terms in which it is applied to him. Parker v. Levy, 417 U.S. 733 (1974); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981). Exception: if statute confers third–party standing. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

i. Lack of Ripeness (no justiciable case or controversy).[4]

(1) "The conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in original).

(2) Rationale: Avoid premature litigation of suits and protect agencies from unnecessary judicial interference. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), rev'd on other grounds, Califano v. Sanders, 430 U.S. 99 (1977).

[4] May also be asserted as failure to state a claim under Rule 12(b)(6).

(3) In determining whether a case is ripe for adjudication, a court must evaluate the fitness of the issues for judicial decision and determine the hardship to the parties of withholding court decision. Abbott, *infra*.

(4) Examples: Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981).

j. Mootness (no justiciable case or controversy).[5]

(1) "Mootness looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case or controversy' that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

(2) General rule: there is no case or controversy once the issues in a lawsuit have been resolved.

(3) Test: a case becomes moot when: "it can be said with assurance that there is no reasonable expectation …that the alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 635 (1979).

(4) Exceptions:

- Capable of repetition, yet evading review. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

- Voluntary cessation. United States v. W.T. Grant Co., 345 U.S. 629 (1953); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

[5] May also be asserted as failure to state a claim under Rule 12(b)(6).

- Collateral consequences. Sibron v. New York, 392 U.S. 40 (1968); Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977). Class actions. Sosna v. Iowa, 419 U.S. 393 (1975)(mootness of the class representative's claim after the class has been certified – the case is not moot); United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)(mootness of class representative's claim after motion for class certification made and denied but before appeal from the denial – the case is not moot); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975)(mootness of class representative's claim before class certification – the case may be moot).

k. No remedy; exclusive remedy.[6]

(1) Judicial review may be foreclosed when the statute which creates the rights does not authorize judicial review. See Califano v. Sanders, 430 U.S. 99 (1977)(no judicial review of decisions of the Secretary of HHS to deny a petition to reopen).

(2) When Congress has specially crafted a comprehensive statutory scheme, it is generally the only avenue for judicial action. See Brown v. General Services Administration, 425 U.S. 820 (1976)(Title VII is the exclusive remedy for discrimination in federal employment).

l. Incorrect Defendant.[7]

(1) The only proper defendant in a suit under the FTCA is the United States.

(2) Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, federal employees cannot be held responsible for common law torts. Exclusive remedy is against the United States under the FTCA. See 28 U.S.C. § 2679(b).

[6] May also be asserted as failure to state a claim under Rule 12(b)(6).
[7] May also be asserted as failure to state a claim under Rule 12(b)(6).

(3) The head of the agency is the only appropriate defendant in a Title VII case.

3. Lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2).

a. For suits against the United States, its agencies and officers, the issue arises in the context of whether there has been sufficient process or service of process upon the government such that the court has jurisdiction over the "person" of the United States.

b. For suits against United States officers in their personal or individual capacities (Bivens suits), this defense is important to consider. May be asserted when an individual is sued in a forum other than where he/she resides or is otherwise amenable to personal jurisdiction.

c. Personal jurisdiction, unlike subject matter jurisdiction, is waivable and must be asserted by the defendant. Petrowski v. Hawkeye-Sec. Ins. Co., 350 U.S. 495 (1956).

d. Whether personal jurisdiction over a nonresident defendant is present will depend upon the state long-arm statute and whether the defendant has sufficient "minimum contacts" with the forum to satisfy due process. See International Shoe Co. v. Washington, 326 U.S. 310 (1945).

(1) The plaintiff must comply with the requirements of the state long-arm statute, and

(2) Maintaining the action must not offend "traditional notions of fair play and substantial justice."

4. Improper venue. Fed. R. Civ. P. 12(b)(3).

   a. Generally, actions against the United States, its officers and agencies, can be brought where the defendant resides, where the cause of action arose, where any real property involved is located, or, if no real property is involved, where the plaintiff resides. 28 U.S.C. § 1391(e). In Bivens cases, section 1391(e) does not apply, and venue is a very important consideration.

   b. Like personal jurisdiction, the defense of improper venue may be waived if not raised in a pre-answer motion or in the answer itself. Fed. R. Civ. P. 12(h)(1).

   c. Actions under the FTCA can be brought only where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

   d. Tucker Act claims brought in the district court can only be brought in the district where the plaintiff resides. 28 U.S.C. § 1402(a)(1).

   e. Compare a motion to dismiss under 12(b)(3) with a motion to transfer venue under 28 U.S.C. § 1404(a).

5. Insufficiency of process. Fed. R. Civ. P. 12(b)(4).

   a. The complaint and summons together constitute "process." Fed. R. Civ. P. 4(b) sets out the required form of the summons.

   b. Rule 12(b)(4) motions challenge the form of the process; if process is defective, plaintiff has failed to perfect personal jurisdiction over the defendant.

   c. Rather than dismiss the action, courts will often quash the service and allow plaintiff to re-serve the defendant. Bolton v. Guiffrida, 569 F. Supp. 30 (N.D. Cal. 1983); Boatman v. Thomas, 320 F. Supp. 1079 (M.D. Pa. 1971).

6. Insufficiency of service of process. Fed. R.Civ. P. 12(b)(5).

   a. Challenge to the manner in which process is served. Has the plaintiff complied with Rule 4? See Bryant v. Rohr Ind., Inc., 116 F.R.D. 530 (W.D. Wash. 1987) (case dismissed without prejudice because of *pro se* plaintiff's failure to show good cause for his failure to comply with requirements of Rule 4).

   b. Like Rule 12(b)(4), courts generally will quash the service and retain the case and provide plaintiff with another opportunity to perfect service. Daley v. ALIA, 105 F.R.D. 87 (E.D.N.Y. 1985); Hill v. Sands, 403 F. Supp. 1368 (N.D. Ill. 1975). But see Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987) (dismissal for failure to serve process within 120 days effectively terminates suit with prejudice if statute of limitations has expired). Accord Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987).

   c. In litigation against the United States, its agencies and officers, consider:

      (1) Has the U.S. Attorney been served with a copy of the summons and complaint by hand delivery or by registered or certified mail directed to the appropriate person in accordance with Rule 4(i)?

      (2) Has the Attorney General been served by registered or certified mail in accordance with Rule 4(i)?

      (3) Are individual defendants being sued in their official or individual capacities?

         (a) Official capacity service can be accomplished by certified mail under 28 U.S.C. § 1391(e), or pursuant to Rule 4(i)(2)(A).

         (b) Individual capacity service must be perfected as required for any other private party. If the complaint arguably implicates official activities of the individually-named federal officer defendant, service on the United States is also be required. Fed. R. Civ. P. 4(i)(2)(B).

(4) Has service been made within 120 days of filing? See Lambert v. United States, 44 F.3d 296 (5th Cir.1995)(Plaintiff's first FTCA action dismissed for failure to effect service IAW Rule 4(i) within 120 days and second FTCA action filed against United States dismissed as untimely under FTCA's six month statute of limitations).

7. Failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

a. The modern equivalent to the demurrer.

b. The motion will be granted only if the defendant can demonstrate that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957); Carter v. Cornwell, 983 F.2d 52 (6th Cir. 1993).

c. Factual allegations of the complaint are assumed to be true and all reasonable inferences are made in favor of the nonmoving party. United States v. Gaubert, 499 U.S. 315, 327 (1991).

d. The court's inquiry is limited to the four corners of the complaint; if the court considers matters outside the pleadings, the motion is treated as one for summary judgment under Fed. R. Civ. P. 56. California v. American Stores Co., 872 F.2d 837 (9th Cir.); J.M. Mechanical Corp. v. United States, 716 F.2d 190 (3d Cir. 1983); Biesenbach v. Guenther, 588 F.2d 400 (3d Cir. 1978); Fed. R. Civ. P. 12(b).

e. In the context of Bivens claims and claims alleging fraud, conspiracy, and other civil rights violations, a heightened pleading standard applies, and the operative facts upon which the claim is based must be pled. Mere conclusory allegations are insufficient. See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

f. In a Bivens action, the plaintiff must plead the personal involvement of each defendant and vicarious liability is not allowed. Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390 n.2 (1971).

g. Examples of Rule 12(b)(6) motions in federal litigation:

(1) Absolute official immunity: If allegations of the complaint contain all of the facts upon which the defense of absolute immunity is based, dismissal under Rule 12(b)(6) is appropriate. Imbler v. Pachtman, 424 U.S. 409 (1976).

(2) Nonjusticiable "political questions": Subject matter jurisdiction is present because the matter is a "case or controversy" under Article III, but is otherwise unsuited for judicial resolution because of a constitutional commitment to another branch of government. Gilligan v. Morgan, 413 U.S. 1 (1973).

(3) Feres based immunity of military officers from Bivens actions brought by their subordinates. Cf. Chappell v. Wallace, 462 U.S. 296 (1983).

(4) Nonreviewable military activities: Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

(5) FTCA cases that fail to allege a cause of action under state law: Davis v. Dep't of Army, 602 F. Supp. 355 (D. Md. 1985).

8. Failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7).

9. Timing and waiver of Rule 12(b) motions. Fed. R. Civ. P. 12(h).

a. 12(b) defenses “may at the option of the pleader be made by motion.” However, a motion raising any of the defenses enumerated in that section "shall be made before pleading if a further pleading is permitted." Fed. R. Civ. P. 12(b).

b. If a motion is filed under Rule 12 and the movant omits therefrom the defense of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process, the defense is waived. Fed. R. Civ. P. 12(g)&(h)(1). See Guccione v. Flynt, 618 F. Supp. 164 (S.D.N.Y. 1985) (failure to raise lack of personal jurisdiction in a motion challenging insufficiency of service of process constitutes a waiver of the defense of lack of personal jurisdiction).

c. Failure to include lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process in the answer if no Rule 12 motion is filed constitutes waiver. Fed. R. Civ. P. 12(h)(1). See also Benveniste v. Eisman, 119 F.R.D. 628 (S.D.N.Y. 1988) (insufficiency of service waived even though preserved in the answer but not presented to the court for resolution until almost four years after the action was commenced).

C. Motion for Judgment on the Pleadings. Fed. R. Civ. P. 12(c).

1. A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings.

2. On motion for judgment on the pleadings, court must accept all factual allegations of the complaint as true and motion is granted when movant is entitled to judgment as a matter of law. Westlands Water District v. U.S. Dep't of Interior, 805 F.Supp. 1503, 1506 (E.D. Cal. 1992), aff'd 10 F.3d 667 (9th Cir. 1993).

3. If matters outside the pleading are presented to and not excluded by the court, motion is treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(c); Latecoere International, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994).

D. Other Rule 12 Motions.

1. Motion for more definite statement. Fed. R. Civ. P. 12(e). Proper when pleading to which a responsive pleading is permitted is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."

2. Motion to strike. Fed. R. Civ. P. 12(f).

a. When? Before responding to a pleading or, if no response permitted, within 20 days of service.

b. What? Any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

E. Motion for Summary Judgment. Fed. R. Civ. P. 56.

1. Summary judgment disposes of cases where there is no dispute as to any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

2. Since summary judgment precludes trial of the case and thus denies litigants their "day in court," it is sometimes referred to as a "drastic" or "extreme" remedy. See Jones v. Nelson, 484 F.2d 1165 (10th Cir. 1973); U.S. v. Porter, 581 F.2d 698 (8th Cir. 1978).

3. Moving party's burden is to show that there is no dispute as to a genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982).

   a. Substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the case will properly prevail on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

   b. Burden is met by the pleadings, depositions, answers to interrogatories, admissions, and any affidavits submitted by the movant in support of the motion. Bell v. Dillard Dep't Stores, Inc., 85 F.3d 1451 (10th Cir. 1996).

   c. Moving party is entitled to summary judgment if after adequate time for discovery the party who will have the burden of proof at trial on an essential element cannot make a showing sufficient to establish the existence of that element. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

4. The responding party need only show a dispute as to a genuine issue of material fact to defeat the motion.

   a. Materials submitted in support of the motion should be viewed in light most favorable to the non-moving party and all reasonable inferences should be drawn in his favor. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

   b. Once a motion has been made and supported by depositions, admissions, affidavits, etc., the opposing party cannot rest upon the allegations in the pleadings; he must respond with affidavits and evidence of his own to create a material issue of fact. Fed. R. Civ. P. 56(e). Adler v. Glickman, 87 F.3d 956 (7th Cir. 1996).

c. When the primary issue is one of intent or state of mind, summary judgment is generally inappropriate. Suydam v. Reed-Stenhouse of Wash., Inc., 820 F.2d 1506 (9th Cir. 1987).

5. Rule 56 in military litigation.

V. CONCLUSION.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF GEORGIA

BENNIE DRIVER,
Plaintiff,
v.

Civil Action, File
No._____

SERGEANT RALPH CRAMDEN,
MAJOR PHILIP GONZALEZ, M.D.,
MAJOR GENERAL ARLO GUTHRIE,
UNITED STATES ARMY, and
UNITED STATES OF AMERICA,
Defendants.
_____/

COMPLAINT

Comes now Plaintiff BENNIE DRIVER and sues Defendants SERGEANT RALPH CRAMDEN ("CRAMDEN"), MAJOR PHILIP GONZALEZ, M.D., ("GONZALEZ'), MAJOR GENERAL ARLO GUTHRIE ("GUTHRIE"), the UNITED STATES ARMY ("ARMY") and the UNITED STATES OF AMERICA ("USA"), and alleges:

Jurisdiction

1. This action arises under the Constitution of the United States and federal law. The matter in controversy exceeds, exclusive of interests and costs, the sum of fifty thousand dollars.

Factual Background

2. On March 17, 2004, Plaintiff DRIVER was operating his privately owned motor vehicle on Normandy Avenue, a public right of way on Fort Swampy, Georgia.

3. At all material times, Plaintiff DRIVER was operating his motor vehicle in accordance with all applicable laws and regulations.

4. Plaintiff is an American of African descent, commonly referred to as "Black."

5. At all material times, Defendant CRAMDEN was on duty as a military policemen assigned as a sergeant to the 12th Military Police Company, Fort Swampy, Georgia.

6. On March 17, 2004, while on road patrol duty at Fort Swampy, Georgia, for the 12th Military Police Company, at approximately 10 p.m., Defendant CRAMDEN observed Plaintiff DRIVER operating his vehicle on Normandy Avenue, Fort Swampy.

7. At approximately, 10 p.m. on March 17, 2004, without legal cause or provocation, Defendant CRAMDEN activated his emergency flashing lights and forced Plaintiff DRIVER to pull to the side of Normandy Avenue.

8. During this illegal traffic stop, Defendant CRAMDEN pulled Plaintiff DRIVER from his motor vehicle, causing physical and emotional injury to Plaintiff DRIVER.

9. During this illegal traffic stop, Defendant CRAMDEN told Plaintiff DRIVER that he was "nothing but a f---ing n--gger."

10. During this illegal traffic stop, Defendant CRAMDEN arrested Plaintiff DRIVER and transported him to the U.S. Army Medical Center, Fort Swampy, for treatment of the injuries inflicted on Plaintiff DRIVER by Defendant CRAMDEN.

11. At all material times on March 17, 2004, Defendant GONZALEZ was on duty as an Emergency Room physician at the U.S. Army Medical Center, Fort Swampy, Georgia.

12. Defendant GONZALEZ negligently treated Plaintiff DRIVER for injuries sustained during the illegal traffic stop and arrest by Defendant CRAMDEN.

13. As a result of Defendant GONZALEZ's negligent treatment of Plaintiff DRIVER, Plaintiff DRIVER suffered further physical and emotional injury, including great bodily harm and permanent disfigurement.

14. At all material times, Defendant GUTHRIE was the Commanding General of Fort Swampy. As such, he had supervisory authority and control over Defendants CRAMDEN and GONZALEZ and was responsible for their training.

15. Defendant GUTHRIE negligently supervised and negligently trained Defendants GUTHRIE and GONZALEZ.

16. As a result of Defendant GUTHRIE's conduct, Plaintiff DRIVER sustained physical and emotional injuries.

17. At all material times, Defendants CRAMDEN, GONZALEZ and GUTHRIE were on active duty in the UNITED STATES ARMY. The ARMY is an agency of the United States government.

18. As a result of the actions of the Defendants, Plaintiff DRIVER suffered great pain of body and mind, permanent disfigurement, and lost business income. Plaintiff DRIVER has also incurred expenses for medical treatment and hospitalization.

Count I, Negligence

19. Plaintiff re-alleges the allegations set forth in paragraphs 1 through 18, above, as if fully set forth herein.

20. Plaintiff has exhausted his administrative remedies and has satisfied all conditions precedent to the filing of this action.

Wherefore, Plaintiff demands judgment against Defendants CRAMDEN, GONZALEZ, GUTHRIE, ARMY and USA for a sum in excess of fifty thousand dollars, to fully compensate the Plaintiff for his injuries, plus punitive damages, costs, and attorney fees.

Count II, Constitutional Tort

21. Plaintiff re-alleges the allegations set forth in paragraphs 1 through 18, above, as if fully set forth herein.

22. Defendant CRAMDEN willfully and recklessly violated the Plaintiff's constitutional rights by making racially biased and inflammatory statements to the Plaintiff and arresting the Plaintiff without legal cause. Defendant CRAMDEN further violated the Plaintiff's constitutional rights by his illegal assault and battery of the Plaintiff.

Wherefore, Plaintiff demands judgment against Defendants CRAMDEN, GUTHRIE, ARMY and USA for a sum in excess of fifty thousand dollars, to fully compensate the Plaintiff for his injuries, plus punitive damages, costs, and attorney fees.

Harry Smith, Esq.
1 Freedom Way
Hinesville, GA 21324
Attorney for Plaintiff

24TH FEDERAL LITIGATION COURSE

PLEADINGS & MOTIONS PRACTICE SEMINAR MATERIALS

The following materials are provided for the pleadings and motions practice seminar exercises.

1. Complaint No. 1 – Driver v. Cramden et. al.

2. Complaint No. 2 - CAE USA, Inc. v. Dep't of Navy.

3. Complaint No. 3 - Burns v. Harvey.

4. Complaint No. 4 - Martin v. Nicholoson.

Review each complaint and identify and discuss possible grounds for motions to dismiss or other Rule 12 motions. Analyze each complaint as to each named defendant.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

GEORGE P. BURNS 16 Little Fox Lane Norwalk, CT 06850 Plaintiff, v. THE HONORABLE FRANCIS J. HARVEY Secretary of the Army Defendant.	)	Case No.: 03CV00435

COMPLAINT

This is a claim for declaratory relief to overturn the decision of the Army and the Army's Officer Special Review Board which denied plaintiff relief.

1. Jurisdiction is conferred on this Honorable Court by the Administrative Procedure Act, as amended, 5 U.S.C. § 702 and § 706(2)(A).

2. Venue is proper as the Defendant is found in this District, at the office of the Secretary of the Army, The Pentagon, Room 4E724, Washington, DC 20330.

PARTIES

3. At all relevant times, George P. Burns, was an officer in the active United States Army serving in the grade of Captain (0-3) or Major (0-4).

4. At all relevant times, the Honorable Thomas White, in his official capacity was the Secretary of the Army.

FACTS

5. In June 1991, Plaintiff received a company command annual officer evaluation report ("OER") for the period 14 June 1990 to 13 June 1991. The OER contained evaluations by a rater and a senior rater.

6. During the rating period, plaintiff served in Germany and later in combat in Southwest Asia during the Persian Gulf War. Plaintiff is an infantry officer.

7. In the OER, Part VIIa., plaintiff's senior rated evaluated the plaintiff's potential by placing an "X" in the second block of ten available blocks, with ten being the lowest rating. Under Army regulations, this rating is made by comparing all other officers of the same grade Army-wide. At the time of the rating, plaintiff was rated above the center of mass for company commanders.

8. In Part VIIb of plaintiff's OER, the senior rater noted:

> CPT Burns has developed into an outstanding Company Commander. His company executed a safe and rapid deployment to SWA [Southwest Asia] and performed superbly during offensive operations aimed at the liberation of Kuwait. Consolidation operations and humanitarian assistance provided by his company after cessation of hostilities were particularly outstanding.
>
> Solid potential for advancement. Promote to major and consider for CGSC [Command and General Staff College] when eligible.
>
> (This evaluation does not reflect a downturn in performance; rather I have restarted my profile).

9. Plaintiff's senior rater profile, prior to the restart, had a center of mass in the third of 10 blocks. After the senior rater restarted hi s profile, his center of mass was at the second of 10 blocks.

10. Plaintiff appealed his OER to the Officer Special Review Board ("OSRD") on March 6, 1993, seeking to delete Parts VII a and b, on the basis that this report unfairly showed him below or at center of mass when a fair evaluation would show him above center of mass.

11. The OSRB denied plaintiff's appeal on July 2, 1993.

12. In 1996, plaintiff was selected for promotion to Major. The selection rate for this board was about 85%.

13. In 1996, plaintiff was not selected to attend resident Command and General Staff College. He was also non-selected on September 7, 1997, one year after most of the peers in his grade. It is unlikely that the plaintiff will be selected for attendance in the future.

14. The non-selection of plaintiff for Command and General Staff College in 1996 and 1997 is indicative of the fact that plaintiff's future career opportunities with the U.S. Army will be limited.

15. Plaintiff now seeks judicial review of the Army's failure to promote him and to select him for Command and General Staff College.

CAUSE OF ACTION

The Army's denial of relief to plaintiff is arbitrary and capricious, unsupported by substantial evidence, and otherwise not in accordance with law, Army regulation and practice.

PRAYER FOR RELIEF

WHEREFORE, for all the foregoing reasons, plaintiff demands judgment against defendant

a) That the Army be ordered to amend plaintiff's OER covering the period 14 June 1990 through 13 June 1991, by deleting Part VIIa and VIIb;

b) That the Army set aside plaintiff's two non-selections to attend the resident Command and General Staff College and reconsider plaintiff's 1997 application to attend the school;

c) That this Court grant any and all additional relief as deemed appropriate, including attorneys' fees and costs.

GEORGE P. BURNS

By_____
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UNITED STATES DISCTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CAE USA, INC.,
A Florida corporation,

Plaintiff,

vs.

DEPARTMENT OF THE NAVY,

Defendant.

COMPLAINT FOR PERMANENT INJUCTIVE RELIEF
AND DECLARATORY RELIEF

The Plaintiff, CAE USA, Inc., ("CAE"), by and through undersigned counsel, hereby sues the defendant, the Department of the Navy ("Navy") for permanent injunctive relief, and declaratory relief, as follows:

1. In this action, CAI seeks to prevent the Navy from disclosing trade secrets or confidential business or financial records supplied by CAE to the Navy in connection with the approval of CAE as a provider of simulation and training services to the Navy.

2. This Court has subject matter jurisdiction pursuant to Title 5, United States Code, section 552, et seq., The Freedom of Information Act.

3. The conflicting positions of the parties with respect to whether the information in question is subject to disclosure also gives rise to an actual and justiciable controversy cognizable under the Federal Declaratory Judgment Act, Title 28, United States Code, section 2201, et seq.

4. Venue is proper in the Middle District of Florida pursuant to Title 28, United States Code, section 2201, et seq.

5. CAE is, and was at all times relevant to this litigation, a corporation organized and existing under the laws of the State of Florida with its place of business at 4908 Tampa West Boulevard, Tampa, Florida.

6. Award of Contract N61339-01-D-0725

    a. CAE is in the business of providing simulation technologies for training solutions for aerospace and military customers.

b. On or about May 4, 2001, the Navy issued a Request for Proposal ("Request") for vendors of simulation services. The Request was designed to obtain proposals from qualified vendors to establish an approved vendors list to whom the Navy could issue further task orders relating to simulation and training

*** *** *** *** *** ***

e. As a result of the Request and ensuing process, the Navy selected seventeen vendors, including CAE, from which to purchase simulation and training services in the "Virtual Domain." These vendors are now qualified to submit competing proposals for services in response to specific task orders issued by the Navy.
f. The CAE contract contains trade secret and confidential business information belonging to CAE. Specifically, section B of the CAE contract sets forth "burdened labor rates", i.e., labor rates that CAE intends to use in formulating bids for Time and Material task orders issued by the Navy. Each project described in a Navy Time and Material task order requires that certain tasks be performed by specialists, including but not limited to engineers, analysts, and scientists. In responding to such a task order issued by the Navy, each approved vendor must estimate the amount of time each specialist will require to complete the proposed task. The "burdened labor rates" are the rates CAE intends to utilize in preparing a proposal in response to a Navy Time and Material task order.

*** *** *** *** *** ***

15. The FOIA request.

a. On information and belief, on or about March 23, 2004, the Navy received a Freedom of Information Act ("FOIA") request fro FOIA Group, Inc. ("FOIA Group"), for a complete copy of Contract N61339-01-D-0725. On information and belief, FOIA Group submitted the FOIA request on behalf of one or more of the sixteen vendors, other than CAE, approved by the Navy to provide simulation service in the "Virtual Domain."
b. On or about March 23, 2004, the Navy sent a letter to CAE informing it of the FOIA request and of Navy's intention to produce a copy of the CAE contract, Contract N61339-01-D-0725, on or about April 6, 2004. A complete and accurate copy of this letter is attached as Exhibit B.
c. By letter dated March 26, 2004, CAE informed the Navy that it considered certain portions of the CAE contract to contain confidential business information that, if released, would cause CAE substantial competitive harm. A complete and accurate copy of that letter is attached as Exhibit C.

d. By letter dated April 5, 2004, CAE provided further clarification of its position that certain portions of the CAE contract contained trade secret or confidential business information. A complete and accurate copy of that letter is attached as Exhibit D.
e. By letter dated April 27, 2004, the Navy informed CAE that it intended to deliver a copy of the CAE contract, Contract N61339-01-D-0725, in response to the FOIA request without redacting the burdened labor rates listed in the contract. A complete and accurate copy of that letter is attached as Exhibit E.
f. The information that the Navy seeks to disclose pursuant to the FOIA request constitutes "trade secrets" or "confidential or financial information" within the Meaning of Section 552 of the FOIA. 5 U.S.C. sec. 552(b)(4).
g. The burdened labor rates depicted on pages 8-9 of the CAE contract, Contract N61339-01-D-072, are protected from disclosure under the Trade Secrets Act, 18 U.S.C. sec. 1905.
h. In light of the fact that burdened labor rates are protected under the Trade Secrets Act, the Navy's decision to an unredacted copy of the CAE contract, Contract N61339-01-D-072, to the FOIA Group constitutes an agency action with is arbitrary, capricious, and an abuse of discretion not otherwise in accordance with the law," within the meaning of the Administrative Procedures Act, 5 U.S.C. sec. 706(2)(A) (1998).

*** *** *** *** *** ***

WHEREFORE, Plaintiff, CAE, demands relief in its favor and against Defendant, the Department of the Navy, as follows:

a. That this Court enter an order declaring that the "burdened labor rates" referred to in the CAE contract, Contract N61339-01-D-07, are "trade secrets" and "confidential commercial or financial information" within the meaning of the Federal Trade Secrets Act and the Freedom of Information Act;

b. That a permanent injunction be entered in favor of CAE and against the Navy, permanently restraining the Navy from disclosing the CAE contract, Contract N61339-01-D-07, without redacting the burdened labor rates therein;

c. That this Court grant such other and further legal and equitable relief against the Navy to which it finds CAE entitled.

UNITED STATES DISCTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALVEN D. MARTIN,

Plaintiff,

vs.

R. JAMES NICHOLSON,
As Secretary of the United States Department
Of Veterans Affairs,

Defendant.

CIVIL RIGHTS COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Alven D. Martin, by and through undersigned counsel, sues R. James Nicholson. in his official capacity as Secretary of the United States Department of Veterans Affairs, alleging unlawful employment practices, and demanding a jury trial. In support of his claim for relief, Plaintiff alleges as follows.

1. This is an action for damages and other relief brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec.s 1981a, 2000e, et seq. Plaintiff invokes the federal question and civil rights jurisdiction of this Court, under 28 U.S.C. sec.s 1331 and 1343(a)(4).

2. The claim asserted in this complaint arose in Stuart, Florida.

3. Plaintiff is a citizen of the United States and a resident of Tampa, Florida.

4. Defendant is the Secretary of the United States Department of Veterans Affairs, which Department is an Executive agency of the federal government. In his official capacity, Secretary Nicholson exercises administrative and supervisory control over every Department of Veterans Affairs facility, including the Outpatient Day Clinic facility (ODCF) in Stuart, Florida. As such, Secretary Nicholson is the "head of the . . . . agency" as contemplated under 42 U.S.C. sec. 2000e-16(c).

FACTS

5. Plaintiff was first employed at the ODCF on January 22, 1990. He had been working in Engineering at the VA facility in Little Rock, Arkansas, and had an associate degree in Electronic Engineering Technology, and had been recommended for work at ODCF in Engineering as an Electrical Helper. When he arrived, he was to interview for that position. After he arrived, he was told that the position had been cancelled, and that

all that was available was a position as a Housekeeping Aid in Building Management at pay grade WG-1. Neil Craig, a white man, was then awarded the Electrical Helper position shortly thereafter, on February 11, 1990.

6. Shortly after Plaintiff began working in Housekeeping, another Electrical Helper position was re-posted, in March or April of 1990. When he attempted to apply, he was told he could not, because of a VA policy that required him to be in his position for at least ninety days before applying for a new position.

7. Under the Vietnam Veterans Readjustment Appointment Authority, Plaintiff could have been awarded the position, rather than be subjected to any waiting period. When Plaintiff raised this with VA personnel, he was told that they "did not know that," and that they would check into it. Thereafter the position was re-posted, and filled by a white man, Steve Ritchie, who was less qualified than Plaintiff. Plaintiff remained in housekeeping.

*** *** *** *** *** ***

12. Plaintiff began to receive promotions to his current position in Graphic Control as Utility Systems Operator/Repairer, pay grade WG-11. Despite the promotions, Plaintiff was constantly harassed by several co-workers, denied training and or manuals, and otherwise discriminated against with respect to terms and conditions of employment, and subjected to a hostile work environment, based on his race and or in retaliation for his previous EEO activity.

COUNT I: TITLE VII DISCRIMINATION

*** *** *** *** *** ***

17. At all times material hereto, Plaintiff was a federal employee of the VA within the meaning of 42 U.S.C. sec. 2000e-16(a). As such, the VA was required to make all employment decisions relating to Plaintiff without respect to his race. VA was further required to provide Plaintiff with a work environment free from racial harassment.

18. VA engaged in unlawful employment practices prohibited by 42 U.S.C. sec. 2000e-16(a), by among other things, improperly disciplining him on account of his race, denying him the ability to perform his job, attempting to "set him up" for discipline, and otherwise subjecting him to a hostile work environment.

*** *** *** *** *** ***

WHEREFORE, Plaintiff, Alven D. Martin, demands a jury trial against the Defendant, R. James Nicholson, and the following relief:

Reimbursement of lost salary, wages, benefits, or other compensation;

Compensatory and Punitive Damages to be set by the jury;

Prejudgment Interest;

Such further relief as this Court deems just and appropriate; and

Costs of this action, including reasonable attorney’s fee.

24TH FEDERAL LITIGATION COURSE

DISCOVERY

I. DISCOVERY: SCOPE, LIMITATIONS, SIGNATURES, SANCTIONS AND SUPPLEMENTATION

A. Scope and Limits of Discovery.

1. Scope: Fed. R. Civ. P. 26(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

a. "Relevancy" in the context of Fed. R. Civ. P. 26(b)(1) is broadly construed.

(1) "[A]ny matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . [is relevant]. . . . [D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues . . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 351 (1978) (citations omitted).

(2) "Relevant to the subject matter" is synonymous with "germane." See Wright & Miller, Federal Practice and Procedure: Civil § 2008 (1985). But see Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990).

(3) Inadmissibility at trial is not grounds for objection to discovery if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." See Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (Engineering document which was not produced during discovery and which contained references to other documents which were not produced so that discovery of original document would, at a minimum, have led to the discovery of additional documents was reasonably calculated to lead to the discovery of admissible evidence).

b. Privileged material is generally not discoverable.

(1) Privileges in the discovery context refer to those privileges found in the law of evidence. U.S. v. Reynolds, 345 U.S. 1, 6 (1953). See also Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings").

(2) Claims of privilege must be made in writing and with specificity. The party claiming the privilege must "describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection. Fed. R. Civ. P. 26(b)(5).

(3) The privileges which may properly be invoked depend on the nature of action. Fed. R. Evid. 501.

(a) If federal law governs the action, (e.g. federal question cases) the privileges recognized by federal common law apply. Askew v. Rigler, 130 F.R.D. 26 (S.D.N.Y. 1990)

(b) If state law provides the rule of decision, either as to an element of the claim or a defense, (e.g. cases brought under diversity jurisdiction) then the privileges recognized under state law apply. Balistrieri v. O'Farrell, 57 F.R.D. 567 (D. Wis. 1972)

(c) When a federal court applies state law in a non-diversity case, e.g., in an FTCA action, it does so by adopting the state rule as federal law, thus "state law" does not provide the rule of decision within the meaning of Fed. R. Evid. 501 and federal law governs the privilege issue. Whitman v. United States, 108 F.R.D. 5, 6 (D.N.H. 1985); Mewborn v. Heckler, 101 F.R.D. 691, 693 (D.D.C. 1984). See generally Wright & Graham, Federal Practice and Procedure, Evidence § 5433.

(d) Exception: Work product immunity is governed by federal law, even in diversity (state law) cases. EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18 (D. Conn. 1992)

(4) Privileges which typically arise in government litigation include:

(a) Military and State Secrets Privilege:

i) Privilege belongs to the government and must be asserted by it.

ii) Must be (1) a formal claim of privilege (2) lodged by the head of the department that has control over the matter (3) after actual personal consideration. United States v. Reynolds, 345 U.S. 1 (1953). See also Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980); Yang v. Reno 157 F.R.D. 625 (M.D. Pa. 1994).

(b) Non-discoverability of intra-agency advisory opinions, or the so-called "deliberative process privilege:"

i) Asserted in the same manner as state secrets privilege.

ii) Designed to protect internal decision-making process and thus encourage full and

free discussions of the various issues and policies by the participants.

iii) Two requirements: (1) information must be deliberative and (2) the information must be predecisional. U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993).

iv) Commonly used to protect aircraft accident safety investigations from disclosure. United States v. Weber Aircraft, 465 U.S. 792 (1984); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), cert. den'd, 375 U.S. 896 (1963).

v) Caveat: If deliberations are in issue, they may be discoverable. Dep't of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295 (S.D.N.Y. 1991).

(c) Work Product Immunity:

i) Protects documents and tangible things prepared by a party, his attorney, agent, or representative, when done in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947). See Leonen v. Johns-Manville, 135 F.R.D. 94 (D.N.J. 1990).

ii) May be overcome if the party seeking discovery has a substantial need for the materials sought and is unable, without undue hardship, to obtain the substantial equivalent by other means. Raso v. CMC Equip. Rental Inc., 154 F.R.D. 126 (E.D. Pa. 1994). Contemporaneous statements are typically so unique as to allow for no "substantial equivalent." Wright & Miller, Federal Practice & Procedure, Civil § 2025. Duck v. Warren, 160 F.R.D. 80 (E.D. Va. 1995).

iii) Even where a showing of need compels production, the impressions, conclusions and opinions of counsel are protected (absent fraud). In re Doe, 662 F.2d 1073 (4th Cir. 1981); FDIC v. Singh, 140 F.R.D. 252 (D. Me. 1992); Diamond State Ins. Co. v. Rebel Oil Co. 157 F.R.D. 691 (D. Nev. 1994). But cf. William Penn Life Assur. v. Brown Trans. & Storage, 141 F.R.D. 142 (W.D. Mo. 1990). See also In re San Juan DuPont Plaza Hotel Fire Lit., 859 F.2d 1007 (1st Cir. 1988); Shelton v. AMC, 805 F.2d 1323 (8th Cir. 1986).

iv) A disclosure by the client or even by counsel to someone other than an adversary does not waive protection. Westinghouse Elec. Corp. v. Rep. of Philippines, 951 F.2d 1414 (3rd Cir. 1991); Khandji v. Keystone Resort Mgt. Inc., 140 F.R.D. 697 (D. Colo. 1992); Data General Corp. v. Grumman Systems Corp., 139 F.R.D. 556 (D. Mass. 1991); Catino v. Travelers Ins. Co., 136 F.R.D. 534 (D. Mass. 1991).

(d) Attorney-Client Privilege:

i) Protects communications between an attorney and the client when made in connection with securing a legal opinion or obtaining legal services. Upjohn Co. v. U.S., 449 U.S. 383 (1981).

ii) Privilege does apply in the government setting. Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984).

iii) Disclosure to any third party waives privilege. In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) (Partial disclosure of otherwise privileged information waives privilege with respect to all communications regarding related subject matter); Harding v. Dana Transport, Inc. 914 F.Supp. 1084 (D.N.J. 1996); Draus v. Healthtrust, Incorporated-The Hosp. Co., 172 F.R.D. 384 (S.D. Ind. 1997) (Inadvertent disclosure waives the privilege).

(e) Non-discoverability of Medical Quality Assurance Records: Records created in a medical quality assurance program are confidential and privileged; they may be disclosed only as provided by statute. 10 U.S.C. § 1102. See W. Woodruff, The Confidentiality of Medical Quality Assurance Records, The Army Lawyer, May 1987, at 5; In re United States of America, 864 F.2d 1153 (5th Cir. 1989).

2. Mandatory disclosures under Fed. R. Civ. P. 26. Certain material must be disclosed to other parties, even absent a request for it.

a. **Initial disclosures.** Without receiving a discovery request and at or within 14 days of the meeting of the parties to plan for discovery held under Rule 26(f) (i.e., usually within 90 days after the defendant makes an appearance), each party must provide the others with:

(1) The name, address and telephone number of witnesses, who are "likely to have discoverable information that the disclosing party may use to support its claims or defenses" and the subjects of which these are knowledgeable;

(2) A copy of any document or a description of any document and all tangible things which the disclosing party may use to support its claims or defenses;

(3) A computation of damages – by damage category, and non-privileged factual material related to the nature and extent of injuries suffered;

(4) A copy of any insurance agreement under which an insurance business may be liable to satisfy any potential judgment.

b. Certain categories of cases are excluded from the initial disclosure requirement. These include:

(1) actions based on an administrative record;

(2) petitions for habeas corpus;

(3) actions brought *pro se* by persons in custody of the United States;

(4) actions to enforce or quash a subpoena or an administrative summons;

(5) actions, by the United States, to recover benefits;

(6) proceedings ancillary to proceedings in other courts;

(7) actions to enforce arbitration awards.

b. A party may not withhold its own initial disclosure because its adversary has failed to comply with this requirement or made an inadequate disclosure.

c. **Expert disclosures**.

(1) The identity of all experts who may be used at trial must be disclosed to the other parties at the time specified by the court, and in no event, less than 90 days before trial.

(a) The disclosure requirement applies to <u>all</u> experts, not just those specially retained;

(b) The scope of the disclosure required for a specially retained expert is substantially greater than for expert witnesses who were not specially retained.

(2) Experts who will present testimony solely to rebut the evidence presented by specially retained witnesses of an

adversary may be designated 30 days after the initial expert disclosure, unless the court orders otherwise.

d. **Pretrial disclosures.**

(1) No later than 30 days prior to trial, unless the court orders otherwise, the parties must disclose:

(a) the identification of all "will call" and "may call" witnesses;

(b) a designation of any testimony which is expected to be presented by deposition, and if the deposition was not stenographically transcribed, a transcript of those designated portions;

(c) the identification of all documents or other exhibits expected to be offered or which may be offered at the trial.

(2) Within 14 days after these disclosures are made, the opposing parties may serve objections to the deposition designations and objections to the admissibility of documents and exhibits. Objections to admissibility, other than on the basis of relevancy, not raised are waived.

3. Scope of discovery for expert witnesses: Fed. R. Civ. P. 26(b)(4).

a. Discovery from experts expected to testify.

(1) Parties may depose expert witnesses retained by their adversaries.

(a) If the court requires the 26(a)(2) expert reports to be exchanged, the deposition cannot be conducted until the report is provided. See Freeland v. Amigo, 103 F.3d 1271 (6th Cir. 1997).

(b) The party seeking discovery must ordinarily pay the reasonable expenses of the expert in responding to discovery. Mathis v. NYNEX, 165 F.R.D. 23 (E.D.N.Y. 1996); but see Reed v. Binder, 165 F.R.D. 424 (D.N.J. 1996) (would be manifestly unjust to force indigent plaintiff to pay defendant's excessive number of experts).

(2) Rule 26(a)(2)(B) sets forth the material which must be produced under the mandatory disclosure requirement and, therefore, also describes some of the information ordinarily discoverable, including:

(a) "all of the opinions to be expressed [by the expert] and the basis and reasons therefor;"

(b) "the data or other information considered by the witness;"

(c) "any exhibits to be used as a summary of or support for the opinions;"

(d) the witness' qualifications including "a list of all publications authored by the witness within the preceding ten years;"

(e) the compensation the witness is receiving for "study and testimony," and;

(f) "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

Ngyuyen v. IBG, Inc. 162 F.R.D. 675 (D. Kan. 1995).

b. Discovery from retained experts who are not expected to testify is ordinarily prohibited. See Coates v. A.C. & S., Inc., 133 F.R.D. 109 (E.D. La. 1990). Fed. R. Civ. P. 26(b)(4)(B):

> A party may . . . discover facts known or opinions held by an expert who has been retained or specially employed . . . in anticipation of litigation or preparation for trial and who is not expected . . . [to testify at trial], only as provided in Rule 35(b) or upon a showing of

exceptional circumstances under which it is impracticable . . . to obtain facts or opinions on the same subject by other means.

(1) In-house experts can be "specially employed" but their pre-retention knowledge and opinions are subject to full discovery. In re Shell Oil Refinery, 134 F.R.D. 148 (E.D. La. 1990).

(2) Providing the work-product of a non-testifying expert to a testifying expert may make it discoverable. Douglas v. University Hosp., 150 F.R.D. 165, 168 (E.D. Mo. 1993), aff'd 34 F.3d 1070.

B. Limitations on Discovery.

1. Limitations imposed by the rules.

a. **Timing.** Discovery may not be initiated until initial disclosures are made and the parties have conferred to plan for discovery. Fed. R. Civ. P. 26(d). Before the December 2000 amendments to the Rules, this requirement, and many other discovery limitations could be avoided by local district court rules. It no longer may be. One principal objective of the December 2000 amendments was to establish uniform national discovery practices for federal courts. Thus, many of the requirements imposed by local rules – in contradiction to requirements of the federal discovery rules - are no longer permissible.

b. **Interrogatories**. A party may propound 25 interrogatories, including sub-parts. Fed. R. Civ. P. 33(a).

(1) An interrogatory composed of several sub-sections may be counted as a single interrogatory or as multiple interrogatories. The relevant determination is whether the interrogatory requests information about "discrete separate subjects." Note of Advisory Committee on Rules, 1993 Amendment.

(2) The number of permissible interrogatories can be increased by leave of court or by written stipulation between the parties.

(3) The court may impose different limitations on interrogatories by a case management order.

c. **Depositions.** Plaintiffs, defendants, and third-party defendants are limited to ten depositions in total. Fed. R. Civ. P. 30(a)(2)(A) & 31(a)(2)(A).

(1) Leave of court, or a written stipulation between the parties, is required in order to take:

(a) Depositions in excess of ten;

(b) The deposition of any person in confinement;

(c) The deposition of anyone who has previously been deposed in the case;

(d) A deposition prior to the Rule 26(f) discovery planning conference.

(2) The court may impose different limitations on depositions by a case management order.

3. Limitations imposed by the forum.

a. The court, by a case management order, may alter the limitations on depositions and interrogatories, or may impose restrictions on the length of depositions and the number of requests for admission. Local rules can impose limitations on the number of requests for admission which may be served.

b. The court may also limit discovery, by order or either *sua sponte* or in response to a motion for a protective order under Fed. R. Civ. P. 26(c), if it determines that:

(1) "[T]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(1)(i). See Baine v. General Motors, 141 F.R.D. 332 (M.D. Ala. 1991); Doubleday v. Ruh, 149 F.R.D. 601 (E.D. Cal. 1993).

(2) "[T]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." Fed. R. Civ. P. 26(b)(1)(ii).

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery sought to the questions at issue. Fed. R. Civ. P. 26(b)(1)(iii). See Rainbow Investors Group, Inc. v. Fuji Trucolor Missouri, Inc., 168 F.R.D. 34 (W.D. La. 1996).

c. The discovery of electronic evidence, particularly "inaccessible electronic evidence," has caused courts to formulate new tests for the determination of whether discovery is "unduly burdensome or expensive," and encouraged courts to enter orders shifting the cost of discovery to the party seeking the production. See Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.RD. 421 (S.D.N.Y. 2002); Zubulake v. UBS Warburg, LLC, No. 02 Civ 1243, 2003 WL 21087884 (S.D.N.Y. May 13, 2003). In determining whether to shift courts may consider:

(1) The extent to which the request is narrowed to the discovery of relevant information;

(2) Whether the evidence produced is or was available from other, less costly, sources;

(3) The cost of producing the evidence in relation to the amount in controversy;

(4) The cost of producing the evidence in relation to the resources of each party;

(5) The relative ability of each party to control costs and its incentive to do so;

(6) The significance of the issues at stake;

(7) The relative benefit – to the various parties – of the evidence produced.

4. Protective orders limiting discovery may also be sought under Rule 26(c), but the party seeking protection bears a substantial burden of showing entitlement. See In re Agent Orange Product Liability Litigation, 104 F.R.D. 559 (E.D.N.Y. 1985). NOTE: Seeking a protective order does not absolve movant of the duty to respond. Williams v. AT&T, 134 F.R.D. 302 (M.D. Fla. 1991).

   a. A motion seeking a protective order must be accompanied by a certification that the moving party conferred with the affected parties in an attempt to resolve the dispute.

   b. The court has broad discretion in fashioning protective orders. See Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992).

C. Signing Discovery Requests and Responses.

1. "Every disclosure [under Rule 26(a)(1) or (a)(3)] shall be signed by at least one attorney of record . . . . The signature . . . constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." Fed. R. Civ. P. 26(g)(1).

2. "Every discovery request, response, or objection . . . shall be signed by at least one attorney of record . . . ." Fed. R. Civ. P. 26(g)(2):

   "The signature . . . constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response or objection is:

   (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

   (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

   (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Fed. R. Civ. P. 26(g) (emphasis added). See Brandt v. Vulcan, Inc., 30 F.3d 752, 756 n. 8 (7th Cir. 1994).

3. "Reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions arrived at are reasonable under the circumstances. The standard is objective, not a subjective "bad faith" test. While the attorney's signature does not certify the truthfulness of the client's factual responses, it does certify that the lawyer has made reasonable efforts to assure that the client has provided all the information and documents available to him that are responsive to the discovery request.

4. If a certification is made in violation of the rule, the court SHALL impose an appropriate sanction upon the person who made the certification. The court may also sanction the party, or the person signing and the party. Sanctions may include an order to pay the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. Fed. R. Civ. P. 26(g)(3). Malautea v. Suzuki Motor Corp., 148 F.R.D. 362 (S.D. Ga. 1991) aff'd 987 F.2d 1536, cert. den'd, 510 U.S. 863. The criteria for awarding sanctions are similar to those under Rule 11. In re Byrd, Inc., 927 F.2d 1135 (10th Cir. 1991); Apex Oil Co. v. Belchor Co. of New York, Inc., 855 F.2d 1009 (2d Cir. 1988).

5. The provisions of Fed. R. Civ. P. 11 do not apply to discovery pleadings.

6. Agency counsel are generally expected to prepare and sign the answers to interrogatories directed to the agency or the United States when the interrogatories seek information within the knowledge of the agency. United States Attorneys Manual § 4-1.440.

D. Supplementing Responses to Discovery - Fed. R. Civ. P. 26(e).

1. A party has a duty to supplement any disclosures made under Rule 26(a), at appropriate intervals, whenever the party determines that "in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1).

2. A party must seasonably supplement responses to interrogatories, requests for production or requests for admission "if the party learns that the response is in some material respect incomplete or incorrect and if the

additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(2).

3. Generally, there is no obligation to supplement deposition testimony. However, where an expert's deposition is used in whole or in part to satisfy the disclosure requirement of Fed. R. 26(a)(2), a duty to supplement may arise. See also, Freund v. Fleetwood Enterprises, Inc., 956 F.2d 354 (1st Cir. 1992); Blumenfeld v. Stuppi, 921 F.2d 116 (7th Cir. 1990); Bradley v. United States, 866 F.2d 120 (5th Cir. 1989). (Failure to supplement response with identity of expert or substance of his/her facts and opinions may bar use of expert at trial.)

4. Supplementation must be timely ("seasonable"). Fusco v. General Motors Corp. 11 F.3d 259 (1st Cir. 1993) (providing a videotape related to expert testimony on liability one month before trial not seasonable); Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir. 1975) (supplementation of witness list three days before trial warrants excluding them as witnesses); Royalty Petroleum Co. v. Arkla, Inc., 129 F.R.D. 674 (D. Okla. 1990) (supplemental interrogatories on eve of trial warranted excluding testimony on that issue).

5. Counsel who fail to take immediate remedial measures when additional or corrective information is discovered risk running afoul of the duty of candor to the tribunal. See United States v. Shaffer Equipment Co., 796 F.Supp. 938 (S.D. W.Va. 1992)(Government CERCLA cost recovery action dismissed because government counsel violated duty of candor to the tribunal), aff'd in part and rev'd in part, 11 F.3d 454 (4th Cir. 1993).

6. Court can order further supplementation of disclosures or discovery responses.

E Sanctions for Discovery Abuses.

1. Automatic Sanctions.

a. "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c).

(1) No motion is required. However, upon motion and after an opportunity to be heard, the court may impose additional sanctions, including:

(a) reasonable expenses, including attorney's fees, and;

(b) advising the jury of the party's failure to disclose the evidence.

2. Sanctions available upon application to the court. Fed. R. Civ. P. 37.

a. Compelling Discovery. Fed. R. Civ. P. 37(a).

(1) The court wherein the action is pending or the court for the district where a deposition is being taken, may, upon application, enter an order requiring the discovery to take place as requested.

(2) A motion is appropriate when:

(a) The deponent refuses to answer a question posed during a deposition. In such a case, the questioner may adjourn or complete the deposition before seeking the court's intervention.

(b) A party fails to answer an interrogatory.

(c) A party refuses to produce documents or allow inspection as requested.

(d) A party fails to designate an individual pursuant to Fed. R. Civ. P. 30(b)(6).

(3) An evasive or incomplete answer is treated as a failure to respond.

(4) Any motion to compel must include a certification that the moving party attempted, by conference with the person or party resisting discovery, to resolve the matter before seeking court intervention.

(5) In addition to ordering the discovery to take place, the court "shall" order the party or deponent whose conduct necessitated the motion, or the attorney, to pay the moving party the expenses incurred, including a reasonable attorney's fee unless the court finds the opposition was substantially justified or other circumstances make an award unjust.

(6) An award of costs shall also be awarded when the discovery is provided after the motion is filed.

(7) If the motion to compel is denied, the moving party must pay the costs unless the court finds that the making of the motion was justified or other circumstances makes an award unjust.

b. Sanctions for failure to obey the motion to compel.

(1) A deponent who refuses to be sworn or to answer questions after being directed to do so may be held in contempt of court. Fed. R. Civ. P. 37(b)(1). See Mertsching v. U.S., 704 F.2d 505 (8th Cir. 1983).

(2) Oral discovery orders must be complied with and disobedience can give rise to Rule 37 sanctions. Avionc Co. v. General Dynamics Corp., 957 F.2d 555 (8th Cir. 1992); Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991).

(3) Fed. R. Civ. P. 37(b)(2) provides for a wide range of possible sanctions for disobedient parties:

(a) An order establishing facts. See Chilcutt v. U.S., 4 F.3rd 1313 (5th Cir. 1993), reh'g den'd, and cert. den'd 513 U.S. 979. Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982).

(b) An order precluding a party from supporting or opposing a claim or defense or prohibiting him from introducing certain evidence. See Parker v. Freightliner Corp., 940 F.2d 1019 (7th Cir. 1991); Bradley v. U.S., 866 F.2d 120 (5th Cir. 1989); Callwood v. Zurita, 158 F.R.D. 359 (D. Virgin Islands 1994).

(c) An order striking pleadings. See Green v. District of Columbia, 134 F.R.D. 1 (D.D.C. 1991); Frame V. S-H, Inc. 967 F.2d 194 (5th Cir. 1992).

(d) An order staying the proceedings until compliance.

(e) An order dismissing the action or rendering judgment by default against the disobedient party. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). But see, Fed. R. Civ. P. 55(e) ("No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.") See Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, 2003 WL 186645 (S.D.N.Y. Jan. 28, 2003).

(f) An adverse jury instruction. See Residential Funding Corp. v. DeGeorge Home Alliance, Inc. 306 F.3d 99 (2nd Cir. 2002).

(g) An order holding the disobedient party in contempt of court.

(h) Monetary sanctions may be imposed on the party, its attorney(s) (including government counsel), or both. U.S. v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980); Pereira v. Narragansett Fishing Corp.,135 F.R.D. 24 (D. Mass. 1991); F.D.I.C. v. Conner, 20 F.3d 1376 (5th Cir. 1994) (Government attorney required to pay costs from personal funds.)

(4) Sanctions imposed on party need only be "just" and related to the infraction in question. See Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1997)

(5) The "drastic" remedy of dismissal is reserved for the most flagrant violations. In re Exxon Valdez, 102 F.3d 429 (9th Cir. 1996); Bluitt v. ARCO Chemical Co., 777 F.2d 188 (5th Cir. 1985); Spence v. Maryland Cas. Co. 803 F.Supp 649 (W.D.N.Y. 1992) aff'd 995 F.2d 1147. But see Morgan v. Massachusetts General Hosp. Corp., 704 F.2d 12 (1st Cir. 1983). Such actions will only be taken in egregious circumstances (e.g., bad faith, willfulness, or fault). See Refac Intern. Ltd. v. Hitachi Ltd., 921 F.2d 1247 (Fed. Cir. 1990); Monroe v. Ridley, 135 F.R.D. 1 (D.D.C. 1990).

c. A party's failure to attend its own deposition, to answer interrogatories or to respond to requests for production is immediately sanctionable (i.e. the movant need not first secure an order compelling disclosure). Any of the various sanctions, save contempt, may be imposed. Blue Grass Steel, Inc. v. Miller Bldg. Corp. 162 F.R.D. 493 (E.D. Pa. 1995).

d. Expenses upon failure to admit.

(1) If a party refuses to admit the genuineness of a document or the truth of a fact as requested under Fed. R. Civ. P. 36, and the requesting party subsequently proves the genuineness of the document or the truth of the fact, the party refusing to admit may be ordered to pay his opponent's expenses. U.S. v. Watchmakers of Switzerland Information Center, Inc. 25 F.R.D. 197 (C.D.N.Y. 1959).

(2) The court "shall" order payment of the reasonable expenses, including attorney's fees, unless it finds that:

(a) The request was objectionable.

(b) The admission sought was of no substantial importance.

(c) The party refusing to admit had reasonable ground to believe he might prevail.

(d) There were other good reasons for the failure to admit.

e. The court may require a party or an attorney to pay the reasonable expenses incurred by reason of that party or attorney's failure to confer and assist in the development of a discovery plan. Fed. R. Civ. P. 37(g).

f. The court may impose a sanction upon any person who has "frustrated the fair examination of [a] deponent." The sanction may include reasonable attorneys fees and costs incurred by other parties as a result of the offensive conduct. Fed. R. Civ. P. 30(d)(2).

II. DISCOVERY: STRATEGY, PRACTICE AND PROCEDURE

A. Planning for discovery.

1. Discovery in every case should begin with the formulation of a discovery strategy.

f. The discovery strategy should address the following questions:

(1) What information do I have an affirmative obligation to disclose?

(2) What information do I need to obtain?

(3) Who has the information I need?

(4) In what posture in the litigation do I hope to place my adversary through discovery?

(5) What posture in the litigation do I want to avoid?

(6) What information do I have which my adversary will try to obtain and how can I best marshal and present it or prevent its disclosure?

g. Consider the following when preparing the discovery strategy:

(1) The nature and complexity of the legal issues involved;

(2) The amount in controversy or the importance of the principles and positions being attacked by the adversary;

(3) The strategy for the defense of the case;

(4) The number and nature of the parties in the litigation;

(5) The issues likely to be contested and to be conceded.

h. The discovery strategy must be formulated prior to the Rule 26(f) pre-discovery conference of the parties.

i. Check local rules. The December 2000 amendments to the Rules was intended to standardize discovery practice in the U.S. District Courts. Nevertheless, the implementation of the federal rules governing discovery has always varied widely from district to district and sometimes within each division of a district. The importance of securing an up-to-date copy of the local rules of court cannot be overstated.

(1) Local rules may impose additional or different limits on the frequency and amount of discovery than those imposed by the federal rules. E.g., limitations on the number of requests for admissions a party or local conditions for the 26(f) conference. Although the December 2000 amendments should reduce the number of discovery practice variations, some will surely remain.

(2) The particular format for discovery papers, as well as other pleadings and motions, may be set out in the local rules.

(3) Local rules may memorialize customary discovery time limits, alter the time for objecting to discovery, establish procedures for requesting a discovery conference, and delineate the steps that a party must take to resolve a discovery dispute. They may also require a party to set forth certain information with regard to documents for which a privilege is asserted.

(5) Local rules may provide for "uniform discovery definitions" or uniform discovery that must be answered.

(6) Local rules versus "local practice". Local practices may vary considerably from local rules. Consult with a local practitioner if possible.

2. Rule 26(f) pre-discovery conference and discovery plan.

a. Except in specified excepted cases or where a court order provides otherwise, all parties are required to confer before beginning discovery in any action.

b. The conference should be held "as soon as practicable" but not later than 21 days before a scheduling conference is held or a scheduling order is due. See Fed. R. Civ. P. 16(b). Rule 16(b) orders are required within 90 days of the appearance of the defendant, making a 26(f) conference necessary within the first 69 days after an appearance.

c. Topics to be covered at the conference include the nature of the claims and defenses, the likelihood of settlement or other resolution of the case, the conditions for the exchange of mandatory disclosures, and an appropriate discovery plan for the case.

d. All parties are jointly responsible for providing the court with a report within 14 days of the conference outlining the discovery plan. The plan must include:

(1) any agreements regarding initial disclosures, including a statement of when these were or will be made;

(2) the subjects of future discovery, when discovery will be completed, and whether discovery will be phased or limited to certain subject areas;

(3) whether amendments to the limitations on discovery imposed by the federal rules or by the rules of court are necessary for this case;

(4) whether any protective orders regarding discovery or any scheduling or other Rule 16 order should be entered.

e. Rule 26(f) permits the court, by order or local rule, to require that the conference be held less than 21 days prior to the scheduling conference and to require an oral, rather than written report concerning the discovery plan. This amendment was one of the few concessions to those districts which have expedited discovery calendars made by the December 2000 amendments.

3. Implement the discovery strategy by outlining the tasks to be performed in sequence.

a. Complex cases may require a formal discovery planning document assigning tasks and suspense dates to various attorneys involved in the case. In simpler cases, counsel's hand-written notes may suffice as a discovery outline. In any case, the outline should be continuously reviewed and modified as tasks are completed and information is generated.

b. A complete outline includes provisions for providing mandatory disclosures and for responding to opposing discovery, including marshalling any documents or tangible things expected to be requested by the opposing party, and identifying and interviewing any witnesses who will be identified by opposing counsel.

4. The amount of discovery required will depend upon the specifics of the case and available resources.

5. The discovery outline and its implementation in a given case should serve several purposes:

a. It should provide you with useful information in a timely manner.

(1) Facts and testimony should be gathered in time to make effective use of it in subsequent discovery (e.g. expert depositions);

(2) All of the evidence gathered should be consistent with the theories to be advanced at trial.

b. It should use your available resources, including time, efficiently.

c. It should place you in the best negotiating position possible.

d. It should preserve and advance your defenses.

e. It should avoid unnecessary and unflattering appearances before the judge.

B Filing discovery pleadings. Rule 5 (d) provides that Rule 26(a) disclosures and discovery pleadings (i.e. all requests and responses, including interrogatories, requests for documents or to permit entry onto land, requests for admissions and depositions) are not filed until they are used in proceeding or filing is ordered by the court.

C Using the Right Tool for the Right Job (at the right time).

1. Interrogatories (Fed. R. Civ. P. 33).

a. General procedure.

(1) Written questions covering the entire gamut of material and information within the general scope of discovery propounded to a party. Interrogatories directed to a specific agent or employee who is not a named party are improper. Waider v. Chicago, R.I., & P. Ry. Co., 10 F.R.D. 263 (D.C. Iowa 1950).

(2) No more than 25 interrogatories, including all discrete subparts, may be served without leave of the court or agreement of the parties. Check local rules for additional or different requirements.

(3) Unless an objection to the interrogatory is interposed, they must be answered separately and fully under oath. Answers must include all information known by the party or his attorney. See Law v. National Collegiate Athletic Ass'n, 167 F.R.D. 464 (D.Kan. 1996) vacated 96 F.3d 1337; Naismith v. PGA, 85 F.R.D. 552 (D.C. Ga. 1979). When the party is a corporation or a governmental agency, the party can designate an individual to answer the interrogatories and will be bound by the responses. Mangual v. Prudential Lines, Inc., 53 F.R.D. 301 (D.C. Pa. 1971). The attorney for the corporation or governmental agency can answer. Wilson v. Volkswagen of American, 561 F.2d 494, 508 (4th Cir. 1977); Catanzaro v. Masco Corp., 408 F. Supp. 862, 868 (D.C. Del. 1976); United States v. 58.16 Acres of Land, 66 F.R.D. 570 (D.C. Ill. 1975). Ordinarily, an unsworn declaration made under penalty of perjury may be used to satisfy the requirement that the interrogatories be executed under oath. 28 U.S.C. § 1746.

(4) Answers are signed by the party responding; objections are signed by the attorney making them. But note Fed. R. Civ. P. 26(g) which requires the signature of the attorney of record on the answers as well.

(5) Can be used at trial to extent permitted by the rules of evidence.

(6) Party responding can produce business records or files in lieu of answering if the answers can be found therein and, as between the responder and the inquirer, the burden of finding the answers would be equal. Fed. R. Civ. P. 33(d). See Rainbow Pioneer v. Hawaii-Nevada Investment Corp., 711 F.2d 902 (9th Cir. 1983); Walt Disney Co. v. DeFabiis, 168 F.R.D. 281 (C.D. Cal. 1996).

(7) Answers must be served within 30 days unless the court orders a shorter or longer time for response, or the parties agree to same. Failure to timely object constitutes a waiver of any objection including that the information sought is privileged. See, e.g., United States v. 58.16 Acres of Land, 66 F.R.D. 570, 572 (D. Ill. 1975).

b. Drafting Considerations.

(1) Unlike questions asked at a deposition, the answers to interrogatories will be "word-smithed" by the opposing party's attorney. Careful drafting is important. Any excuse to avoid answering an interrogatory will be offered. Don't expect to get a smoking gun out of an interrogatory answer.

(2) The following areas are appropriate for interrogatories in most cases:

(a) Background information on the plaintiff that will usually take some research to produce, such as the dates of past medical treatment, former residences, names and addresses of employers, etc. These items can be acquired through interrogatories rather than wasting deposition time.

(b) Factual details that are not controversial but are not included in the Complaint or Answer.

(b) The application of law to fact or the party's contentions concerning certain facts ("contention interrogatories"). See B. Braun Medical, Inc. v. Abbott Laboratories, 155 F.R.D. 525 (E.D.Pa. 1994); Nestle Food Corp v. Aetna Cas. & Sur. Co., 135 F.R.D. 101 (D.N.J. 1990); In re One Bancorp. Securities Lit., 134 F.R.D. 4 (D. Me. 1991). But cannot ask for pure conclusions of law. Bynum v. United States, 36 F.R.D. 14, 15 (D.C. La. 1965).

(3) Miscellaneous considerations:

(a) Form interrogatories may be a useful starting place in drafting, but should be used with care.

(b) Definitions sections are frequently used in conjunction with interrogatories. By defining terms interrogatories can be shortened and unnecessary objections concerning ambiguity can be avoided. However, the requirements imposed by these sections are often ignored.

(4) Interrogatories that are objectionable in part, must be answered to the extent not objectionable. Fed. R. Civ. P. 33(b)(1). Thus, the rule codifies the common practice of:

(a) stating an objection to the interrogatory;

(b) re-stating the interrogatory in a non-objectionable way, and;

(c) answering the re-stated interrogatory.

c. Timing.

(1) A first set of interrogatories should be propounded as early as possible in order to secure necessary background information for the litigation.

(2) At a minimum, interrogatories should be propounded before depositions unless unusual circumstances dictate otherwise.

(3) A second set of interrogatories propounded late in the case, (i.e. a number of contention interrogatories) used in conjunction with requests for admission can be used to narrow the issues to be tried.

2. Request for Production of Documents and Things (Fed. R. Civ. P. 34).

a. General procedure.

(1) Applies only to parties. Hatch v. Reliance Ins. Co. 758 F.2d 409 (9th Cir. 1985), cert. den'd 474 U.S. 1021.

(2) Must set forth with "reasonable particularity" the documents or things to be produced for inspection, copying, or testing. What is an adequate description is a relative matter. You may designate documents by category. "The goal [of designating documents with reasonable particularity] is that the designation be sufficient to apprise a man of ordinary intelligence what documents are required and that the court be able to ascertain whether the requested documents have been produced." Wright & Miller, Federal Practice and Procedure, Civil § 2211 at 631; U.S. v. National Steel Corp., 26 F.R.D. 607 (C.D. Tex. 1960).

(3) The documents or things must be in the possession, custody, or control of the party.

(a) "Control" generally means the ability to obtain. Comeau v. Rupp, 810 F.Supp. 1127, 1166 (D.Kan. 1992) recon. den'd 810 F.Supp. 1172.

(b) Party seeking production does not have a right, however, to an authorization permitting independent access to the documents or things. Neal v. Boulder, 142 F.R.D. 325, 328 (D.Colo. 1992) (Opposing party was not entitled to an authorization to secure medical records).

(4) Must also set forth a reasonable time, place and manner for inspecting and copying.

(5) A response to a request for inspection must be served within 30 days, unless the court orders a shorter or longer time for it. A response is not production. The response simply agrees to permit inspection or objects.

(6) The responding party "shall" produce documents for inspection in the manner they are kept in the ordinary course of business or organize and label them to correspond with the categories of the request.

b. Drafting considerations for requests and responses

(1) "Reasonable particularity" requirement is one that will cause the most problems. If it can be misunderstood, it will be.

(2) In an effort to get all documents, tendency is to draft over-broad requests. May need to wait until answers to interrogatories are in before adequate production requests can be drafted.

(3) Following types of requests may be appropriate in most cases:

(a) Assuming an appropriate interrogatory was asked, the documents identified in the answer to the interrogatory.

(a) All documents referred to or consulted in preparing answers to interrogatories.

(4) Like interrogatories, the request for production must be tailored to the case at hand.

(5) Electronic information. Fed. R. Civ. P. 34 applies to information stored on any electronic media. Don't overlook the possibility that material subject to production may exist on floppies, hard disks, CD-ROM and may include draft versions of documents, E-Mail messages, databases and other information customarily stored on electronic media. See Zubulake v. UBS Warburg LLC, 02 Civ. 1243, U.S.D.C. (S.D.N.Y.) (Orders of May 13, 2003 and June 24, 2003).

c. Timing.

(1) The request for production should be served as early as possible in the litigation.

(2) Additional requests may be required as further discovery reveals the existence of documents that may not have been described in the initial request. The federal rules make no limitation on the number of requests which may be propounded and local rules seldom do.

(3) In the rare case where local rules limit the number of requests, a single interrogatory that requests the adversary to describe the documents, records and things which exist can be propounded prior to issuing the document request.

d. Securing documents from non-parties.

(1) Fed. R. Civ. P. 34 applies only to parties, therefore, must subpoena documents or things from non-parties.

(2) Can serve subpoena for the individual to appear at a deposition and produce described documents, or subpoena only the documents. Fed. R. Civ. P. 45. Any objection must be raised in court that issued subpoena, not forum court. In re Digital Equipment Corp, 949 F.2d 228 (8th Cir. 1991).

(3) If the discovery sought involves entering upon a non-party's land, such may now be had under amended Fed. R. Civ. P. 45.

3. Physical and Mental Examinations (Fed. R. Civ. P. 35).

a. General procedure.

(1) Absent agreement, an independent medical examination (IME) requires a court order.

(2) An IME is allowed of a party or a person under the custody or control of a party by a "suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)

(3) An IME will be permitted only upon a showing of "good cause".

(a) The mental or physical condition of the person to be examined must be in controversy. A plaintiff in a personal injury case places his mental or physical condition in controversy and thus provides the defendant with good cause. Schlagenhauf v. Holder, 379 U.S. 104 (1964). See also Stanislawski v. Upper River Services, Inc., 134 F.R.D. 260 (D. Minn. 1991) (vocational examinations excluded).

(b) The mental condition of a party is not in issue simply because the intent of a party is in issue. Taylor v. National Group of Companies, Inc., 145 F.R.D. 79, 80 (N.D.Ohio 1992); but see Eckman v. University of Rhode Island, 160 F.R.D. 431 (D.R.I. 1995).

(4) Order must specify the time, place, manner, conditions, and scope of the examination, and the person or persons who will conduct the IME. Thus, all arrangements should be made prior to filing the motion.

(5) Person examined is entitled to a copy of the examiner's report upon request. If request is made, examined party must provide opponent with copies of reports of previous or subsequent examinations. By requesting and obtaining copy of examiner's report or by taking examiner's deposition, person examined waives any doctor-patient privilege that may apply to another person who has examined him or who may examine him in the future with respect to the mental or physical condition in issue.

b. Practical Considerations.

(1) Fed. R. Civ. P. 35 exam can be arranged by stipulation or agreement of the parties. Same general rules concerning exchange of reports, etc., apply to examinations by stipulation unless agreement provides otherwise.

(2) An IME conducted too early in the course of the patient's illness or recovery period may not be valid at the time of trial. For example, an early IME may not provide the patient with enough time to fully improve, and thus, be of little help in minimizing damages. On the other hand, an IME too late may blow any chance of settlement for a reasonable amount or put you in a bind to locate an additional expert to address some condition the examination revealed. Thus, the timing of the IME is important, but it must depend upon the unique circumstances of each case.

(3) A thorough exam by a competent physician may reveal that the adverse party patient is severely disabled and has very little chance of recovery. Thus, you may be helping your opponent's case by seeking the IME. Don't seek an IME until you have obtained all of the plaintiff's medical records and have had them reviewed by appropriate consultants. You may find that an exam is not really needed.

(4) While the rule allows mental as well as physical exams, approach the mental IME with care. Experience shows that a psychiatric/psychological examination seldom results in a diagnosis of no abnormality.

4. Requests for Admissions (Fed. R. Civ. P. 36).

a. Purpose of the rule is to eliminate issues that are not really in dispute and to facilitate the proof of those issues that cannot be eliminated.

b. Request may go to any matter within the scope of discovery. Thus, not strictly limited to seeking admissions of "facts." Furthermore, it is not grounds for objection if the request goes to central facts upon which the case will turn at trial. See, e.g., Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D. Mo. 1973). Prior to the 1970 amendments to the Federal Rules, some courts would restrict the use of Fed. R. Civ. P. 36 and not permit requests that went to "ultimate facts," "mixed law and fact," and "opinion." The 1970 changes provide for Fed. R. Civ. P. 26(b) to govern the scope of the request.

c. General Procedure

(1) Each request must be separately set forth.

(2) Responding party has 30 days within which to answer, unless the court orders a shorter or longer time.

(3) Unless answers are served within the time permitted, the requests will be deemed admitted. Fed. R. Civ. P. 36(a); United States v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987); Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985); E.E.O.C. v. Jordon Graphics, Inc., 135 F.R.D. 126 (W.D.N.C. 1991).

(4) Answers must fairly meet the substance of the request. Cannot evade a response due to lack of "information or knowledge" unless you make a reasonable inquiry in an attempt to gain the information upon which either an admission or a denial can be based. Fed. R. Civ. P. 36(a); United States v. Kenealy, 646 F.2d 699 (1st Cir. 1981), cert. den'd, 454 U.S. 941 (1981). Johnson Intern. Co. v. Jackson Nat. Life Ins. Co., 812 F.Supp. 966 (D. Neb. 1993), aff'd and remanded 19 F.3d 431.

(5) Court has discretion to permit party to withdraw a prior admission or to relieve a party from the effect of an admission for failure to respond. Fed. R. Civ. P. 36(b). Whether the court will exercise that discretion and give the party relief will depend upon the prejudice to the other party and whether the party seeking relief has acted in good faith. Donovan v. Buffalo Downtown Dump Truck Service & Supplies, Inc., 1 Fed. Rules Serv. 3d (Callaghan) 561 (W.D.N.Y. 1985); Baleking Systems, Inc., 40 Fed. Rules Serv. 2d (Callaghan) 1177 (D. Ore. 1984); Gardella v. United States, 23 Fed. Rules Serv. 2d (Callaghan) 867 (D. Mass. 1977).

(6) If a party fails to admit in response to a request and the requesting party subsequently proves the truth of the matter embodied in the request, the party refusing to admit may be required to pay the requesting party's expenses incurred in proving the matter, including reasonable attorney's fees. Fed. R. Civ. P. 37(c).

d. Practical Considerations.

(1) Careful drafting is required. Limit the scope of each request. The narrower the better. "Admit that plaintiff's injuries were proximately caused by his own contributory negligence" v. "Admit that plaintiff consumed four beers between 6:00 p.m. and 8:30 p.m."

(2) Use of request for admissions early in the case will limit the issues and probably save considerable discovery. But, if local rules limit the number of requests it is usually better to wait until after some discovery has been conducted in order to make the best use of the requests.

(3) Requests for admission are particularly well suited for easing introduction of documentary evidence.

(4) Consider using requests for admissions and interrogatories in conjunction. E.g.:

"Admit that plaintiff's tumor was not a prolactin secreting tumor."

"If your response to the foregoing Request for Admission was anything other than an unqualified admission, please set forth with specificity all the evidence and information, including testimony and records of every kind, that you contend supports your response."

(5) United States Attorneys cannot admit liability in cases seeking damages in excess of their settlement authority. Thus, when the request for admission asks the U.S. to admit negligence or liability, the U.S. Attorney may not be permitted to admit, even if an admission is appropriate, without the approval of DOJ. Most cases can be handled with a denial since the request will be so broad and will cover so many issues that an unqualified admission will not be required. Furthermore, if the admission comes early in the case an inability to either admit or deny due to the incomplete nature of the investigation may be appropriate. Difficulties arise, however, where the opponent submits well drafted admissions directed to each of the underlying facts comprising the plaintiff's case. These cannot be avoided and counsel should notify DOJ ASAP.

D. Appellate Review of Discovery Orders

1. Most discovery orders are interlocutory and not immediately appealable. After judgment when they may be appealed, it is often difficult to show prejudice or how the issue is not now moot.

2. Varying ways to seek immediate review are on contempt citations, by writ of mandamus, on appeal from the quashing of a subpoena or on interlocutory appeal under 28 U.S.C. § 1292(b).

3. The standard of appellate review is highly deferential (abuse of discretion). See Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1997); In re San Juan DuPont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988).

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24TH FEDERAL LITIGATION COURSE

DISCOVERY - DEPOSITIONS

I. DEPOSITIONS – RULES AND PROCEDURES

A. Depositions Upon Written Questions (Fed. R. Civ. P. 31).

1. "Interrogatories" to non-parties.

2. Subpoena issued under Fed. R. Civ. P. 45 can compel the witness to attend.

3. No more than 10 depositions under this rule and under Rule 30 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

4. General Procedure.

(a) Party noticing the deposition must serve notice and his questions upon all other parties.

(b) Parties then have 14 days to serve cross-examination questions. Within 7 days of service of cross-examination questions, party noticing deposition may serve re-direct questions. Opponent then has 7 days to serve re-cross.

(c) After all questions have been served and re-served, party noticing the deposition delivers them to the court reporter and issues subpoena for the witness. Court reporter reads the questions to the witness and records the answers.

5. Practical Considerations.

(a) Much cheaper to mail a set of questions to a court reporter than to fly to some distant location to depose the witness in person.

(b) Useful for establishing evidentiary foundations to authenticate documents or to lay foundations for business records, etc.

(c) If the witness knows anything about the "facts" of the case, the deposition upon written questions is a very cumbersome and unreliable way to get that person's testimony.

(d) Will probably become even more underutilized as video-conferencing for depositions becomes cheaper and more accessible.

B. Depositions Upon Oral Examination (Fed. R. Civ. P. 30).

1. General Procedures.

(a) Must give "reasonable notice" in writing to all other parties. Must include time, date, place, and name of witness to be examined, as well as the manner in which the deposition will be recorded.

(b) What is "reasonable" will depend upon the circumstances. Compare Lloyd v. Cessna Aircraft, 430 F. Supp. 25 (E.D. Tenn. 1976) (Two days not reasonable), with FAA v. Landry, 705 F.2d 624 (2d Cir. 1983) (Four days reasonable). But see National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602 (11th Cir. 1984) (Four days not reasonable).

(c) Notice served less than 11 days prior to the deposition is risky. Under Rule 32, if a party "promptly" files a motion for protective order that the deposition be taken at another time or place or not be taken, and the motion is pending when the deposition is taken, the deposition may not be used against the party. Fed. R. Civ. P. 32(a)(3).

(d) Witness attendance may be compelled through the use of a subpoena. Fed. R. Civ. P. 45. Notice is sufficient to compel the attendance of a party. Pinkham v. Paul, 91 F.R.D. 613 (D. Me. 1981).

(e) General rule is that the plaintiff must appear for his deposition in the forum. Martin Engineering Co. v. Vibrators, Inc., 20 Fed. R. Serv. 2d (Callaghan) 486 (E.D. Ark. 1975). But, the place of the deposition is within the sole discretion of the court and it may alter the location as it deems appropriate. Young v. Clearing, 30 Fed. R. Serv. 2d (Callaghan) 789 (E.D. Pa. 1980). Court will consider convenience, expense, etc. Army policy is to make its employees available for deposition at their duty station without subpoena.

(f) Under Fed. R. Civ. P. 30(b)(6), a party may take the deposition of a corporation, association, or governmental agency by noticing the organization and specifying the scope of the matters it wishes to inquire into. The organization must then designate the witness who will testify. Any admissions made by the designated witness are admissible against the organization. Sanders v. Circle K. Corp. 137 F.R.D. 292 (D. Az. 1991); Moore v. Pyrotech Corp., 137 F.R.D. 356 (D. Kan. 1991). See King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995) for a discussion of the proper procedure and scope of questioning at a deposition noticed pursuant to Rule 30(b)(6).

(g) No more than 10 depositions under this rule and under Rule 31 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

(h) A deposition "may be recorded by sound, sound-and-visual, or stenographic means" unless the court orders otherwise.

(1) The party taking the deposition must state in the notice the method by which the testimony will be recorded.

(2) With prior notice to the deponent and the other parties, a party may designate and arrange for another method of recording the testimony, at that party's expense.

(3) Any party may arrange for a transcipt to be made from a deposition recorded by other than stenographic means.

(4) If a nonstenographically recorded deposition is used at trial, those portions used must be transcribed. The stated preference for the presentation of deposition evidence is by nonstenographic means. Fed. R. Civ. P. 32(c).

(i) Fed. R. Civ. P. 30(b)(7) provides deposition can be taken by telephone or other remote electronic means (e.g. satellite television) upon stipulation of parties or court order. Cost effective means to secure evidence, but obvious limitations. See Baker v. Institute for Scientific Information, 134 F.R.D. 117 (E.D. Pa. 1991).

(j) If, before to the conclusion of the deposition, the deponent or any party requests to review the deposition before it is filed, the deponent will be given 30 days after the transcript or recording is available to review and correct it. Purpose of review is to correct substantive or transcription errors of the court reporter, not to permit broad amendment of testimony. Greenway v. International Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) (Sixty-four corrections in 200 page deposition, many of them substantive, not permitted.)

(k) As a general rule, "counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." Armstrong v. Hussman Corp., 163 F.R.D. 299, 303 (E.D. Mo. 1995).

(l) Depositions are presumptively limited to one day of seven hours. However, the court "must allow additional time . . . if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination." Fed. R. Civ. P. 30(d)(2).

II. TAKING AND DEFENDING ORAL DEPOSITIONS – PRACTICE TIPS

A. Defending Depositions.

1. Witness preparation. Every witness should be prepared before the deposition, but the nature and degree of pre-deposition preparation depends on the type of witness and his prior testimonial experience.

2. Your preparation should be designed to make all witnesses informed about and comfortable with the deposition process and

capable of reciting the relevant information they possess in a fashion most favorable to your position in the litigation. It should include:

(a) A review of the relevant evidence likely to be elicited during questioning. Let the witness tell the story first, then go back over parts and explore extent of witness' knowledge, recollection, etc.

(b) A review of all documents which the witness is likely to see during the deposition.

(1) In some cases there may be documents which exist, but you decide the witness should not review prior to testifying. (e.g. a statement by another witness substantially similar to the deponent when the opposing counsel is likely to raise a claim that they collaborated on their testimony). The witness should be told of the existence of the document and what its general nature is so that he will be confident in declaring that he has not previously seen it when it is shown to him.

(2) Caveat: use of privileged documents to prepare a witness for deposition testimony may result in the waiver of the privilege. Sprock v. Peil, 759 F.2d 312 (3d Cir. 1985); S & A Painting Co. Inc., v. O.W.B. Corp., 103 F.R.D. 407 (W.D. Pa. 1984). See the Note of Advisory Committee on Rules, 1993 Amendment to Rule 26(a)(2)(B) ("[L]itigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions - whether or not ultimately relied upon by the expert - are privileged . . . .")

(3) Ensure that deponent has reviewed all his prior statements before being deposed. See Sims v. Lafayette Parish School Bd., 140 F.R.D. 338 (W.D. La. 1992).

(c) Instruction about the three primary purposes of a deposition:

(1) To fix the witness' testimony so that it may be altered at trial only at the expense of the witness' credibility;

(2) To find out what the witness knows;

(3) To assess how credible the witness' testimony will be at trial.

(d) A reminder that the witness will be testifying under oath and that he is required to tell the truth. If opposing counsel asks what the witness was told in preparation, the one instruction that should always be recited is that he was told to tell the truth.

(e) A warning against volunteering information--Being truthful doesn't require the witness to volunteer information that hasn't been elicited by questioning.

(f) A reminder to listen carefully to questions and to ask for the question to be repeated or for clarification if he doesn't understand the question.

(g) A suggestion that questions which can't be answered with "yes" or "no" even though they are phrased to elicit one of those responses, can and <u>should</u> be qualified with additional information. The opposing counsel is not "entitled to a yes or no answer" to any question.

(h) A reassurance that "I don't know" and "I don't remember" are perfectly acceptable responses if they are truthful. However, the questioner may ask for estimates and "best guesses" and there is no rule against these, so long as the record is clear that the response is an estimate.

(i) A reassurance that the preparation session you are conducting is perfectly appropriate and that it is acceptable to relate any of it that the witness can recall if he is questioned about it. Tell your witness, "If you remember nothing else about this session, please recall that I told you to tell the truth."

(j) A warning that the deposition process and the opposing counsel should be taken very seriously. The questioner is not there to help the witness, nor to do him any favors. Treat opposing counsel with courtesy, but there's no reason to be overly "friendly." Don't joke around. A cute remark may not seem so funny when read in court. Don't converse with anyone, the court reporter, opposing counsel, or other attendees about the subject matter of the litigation or related aspects. There is no such thing as a remark "off the record."

(k) A suggestion that the witness should pause and think before answering. This will give you time to object and the witness time to formulate a coherent response.

(l) An instruction that the witness should ask for a break when he needs one. The deposition is not an endurance contest. Confirm that the deposition will probably take some time and that the witness should not assume that it's nearly over simply because he believes he has told his entire story.

(m) A warning that the witness should not agree to do anything for counsel after the deposition. The witness has no obligation to do additional work or research, to improve his memory, or to fill in forgotten details.

(n) An instruction that, if you object, he should stop talking and listen to the objection. Tell the witness that the objection is made only to preserve it for later, but that frequently, listening to the objection will point out deficiencies in the question that may not otherwise be apparent.

3. Preparing expert witnesses. Preparing an expert witness for his deposition poses special problems.

(a) Don't assume that the expert knows or recalls all of the "general witness" instructions. It's the witnesses who have been deposed most frequently who violate them most often.

(b) Ensure that your witness understands your theory of the case and how his testimony fits into it. Prepare him to resist the temptation to offer "off the cuff" opinions on matters you have not asked him to review.

(c) Help the witness anticipate where his opinion will be assaulted and prepare a credible response to good criticisms of his view. Don't deprive your expert of your knowledge about where your adversary's emphasis will be placed.

4. Intra-deposition Issues

(a) Suspending the deposition to seek relief from the court. Fed. R. Civ. P. 30(d) provides that either party or a deponent can suspend the taking of the deposition for the time necessary to petition the court for a protective order when the deposition is being conducted in such a manner so as to annoy, embarrass, or oppress the deponent or party. See Smith v. Loganport Comm. School Corp., 139 F.R.D. 637 (N.D. Ind. 1991).

(b) Objectionable questions.

(1) Fed. R. Civ. P. 32(d)(3)(A)&(B) notes:

(A) "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been [cured] . . . if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(2) Improper questions include: ambiguous or unintelligible, compound, argumentative, leading (on direct), one that calls for a narrative answer, and one that misquotes the witness' testimony.

(3) Counsel should raise only those objections that will be waived if not made at the deposition. Fed. R. Civ. P. 30, Committee Notes.

(4) Any objections are to be stated "concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1). See Danaj v. Farmers (N.D. Okla. 1995)(defense counsel required to cease "speaking objections" and other "obstructionist tactics" at oral deposition).

(5) The objections made will be entered upon the deposition, however, the testimony is taken subject to the objections. Fed. R. Civ. P. 30(c). "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to suspend the taking of the deposition because it is being conducted in bad faith, or in a manner to annoy, embarrass, or oppress the deponent or the party]." Fed. R. Civ. P. 30(d)(1). Thus, unless the question seeks privileged information, the witness must answer subject to the objection. See, e.g., Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); International Union of Elec. Radio and Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277 (D.D.C. 1981); Coates v Johnson & Johnson, 85 F.R.D. 731 (N.D. Ill. 1980); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978); Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977).

(c) "Private conferences between deponents and their attorneys during the taking of a deposition are generally considered improper." Langer v. Presbyterian Medical Center of Pennsylvania, 1995 WL 79520 at 11 (E.D. Pa. Feb. 17, 1995), vacated on other grounds 1995 WL 395937 (E.D. Pa. July 3, 1995). The only exception is a conference to determine whether a privilege should be asserted. Id. See also Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993).

(d) At the conclusion of opposing counsel's questions, weigh very carefully whether you will question the witness. If you question, you provide your opponent with an additional opportunity for questioning.

5. Logistical considerations. The recording requirements for depositions, Fed. R. Civ. P. 30(b), make it mandatory that counsel defending a deposition consider the logistical arrangements for transcription made by others. Remember:

(a) A deposition notice which does not set forth the method of recording is defective;

(b) Any notary public with a cassette recorder is qualified to record a deposition;

(c) If the method of recording by which counsel intends to take a deposition is likely to capture the testimony inaccurately, it may be necessary to arrange for some other means of recording it.

B. Taking Depositions.

1. Objectives.

(a) To discover admissible evidence and develop information that will lead to evidence.

(b) To obtain admissions and create weaknesses in opponent's case.

(c) To learn what witness knows about the case and to fix his testimony.

(d) To discover strengths and weaknesses of opponent's case.

(e) To develop material for cross-examination.

(f) To evaluate the witness and opposing counsel.

(g) To perpetuate testimony.

(h) To display your capabilities and strengths of your case.

(i) To authenticate and lay the foundation for admission of documents into evidence.

(j) To lay the foundation for motions to compel and dispositive motions.

(k) To improve your posture in settlement negotiations.

2. Preparation.

(a) Same preparation as you would for trial testimony.

(b) Review all previous discovery, organize documents to be used at deposition, and prepare outline of questioning.

(c) A form outline for expert testimony is a good beginning, but must be adapted for the particular facts of your litigation.

3. Logistics.

(a) Retain court reporter. Usually hire reporter in the town where the witness lives rather than taking one with you. Check with U.S. Attorney's office to see who they use regularly.

(i) Make telephonic contact with reporter to confirm date/time of deposition.

(ii) If deposition deals with technical or scientific subjects, ask for reporter with experience in those areas.

(iii) Court reporters often have offices or conference facilities suitable for taking depositions and will make those facilities available for the deposition.

(iv) Check to make sure the reporter will provide the kinds of services necessary (i.e. condensed or electronic transcripts, .pdf files for exhibits?)

(b) Arrange for the place to conduct the deposition if it is not at the witness' or court reporter's office. Motel or airport conference rooms, U.S. Attorney's office, or conference/court room at nearby military installation are suitable.

(c) Send out notice to all parties, and court reporter. Arrange for subpoena if non-party is to be deposed.

(a) Double check with court reporter a day or two ahead of time.

(b) Make the court reporter aware of anything out of the ordinary that is likely to disrupt the proceeding or make the court reporter uncomfortable.

4. Relationship with the deponent.

(a) Make a conscious choice about the style you will display during the deposition. Consider the nature of the witness (e.g. lay or expert; fact or specially retained), the relationship of the witness to the litigation, how the witness is likely to view you, and how your performance may effect the witness' view of you in the trial.

(b) Can change tone and/or style during course of deposition, but if you must "get tough" with the witness, do it after you have gotten all of the concessions you can by being "nice."

(d) Establish early in the deposition that you have command of the facts of the case and that you have prepared for this deposition. This is particularly true for expert witnesses who may be tempted to inflate their credentials or the strength of their opinions unless you convince them that it is dangerous to do so.

5. Relationship with counsel.

(a) Establish control. Arrive early and set the room up as you want it (with deference to the needs and requests of your court reporter).

(b) NEVER let opposing counsel know that your time is limited (e.g. that you need to catch a particular flight home).

(c) Your attitude toward opposing counsel when first entering the room can be very significant to the deponent's perception of you. E.g., if you are courteous and friendly and engage in some "light-hearted" banter, the witness may think that you are not as big an ogre as his lawyer told him you were.

6. Interrogating the witness.

(a) Opening explanation and agreement.

(i) Have court reporter swear witness and, if relevant, attach a copy of notice to record. For video depositions, do the 30(b)(4) litany.

(ii) Introduce yourself on the record and cover following points:

a) Who you represent and purpose of deposition.

b) You will ask questions and witness will answer under oath and court reporter will record the exchange verbatim.

c) Not trying to trick witness, just want to know what information he has that is relevant and material to the case.

d) Ask witness to agree to ask for clarification of any question that he/she does not understand. If question is answered you must assume that witness understood question.

e) If need break just say so.

f) Any reason why can't take the deposition at this time.

g) Any plans to move or change positions in future.

(b) Inquire about the witness' preparation.

1. What documents were reviewed?

2. Who did witness talk to about case?

3. What was substance of any conversation with anyone (including counsel) about case/testimony?

(c) Inquire about documents produced.

1. If documents were to be produced go over each one individually and have deponent identify.

2. If documents were not produced that were requested ask questions to determine who may have custody/control and why they weren't produced.

(d) Miscellaneous.

1. Frequently use catch-all questions:

"Have you told me everything you can remember?"

“Is there anything that would refresh you memory?"

"What else do you recall?"

"Is that all you can remember?"

2. Use pregnant pauses to allow the witness to volunteer information.

3. Clarify special terms:

“When I refer to ‘peer-reviewed journals’ what do understand that to mean, if anything?”

(e) Deal with evasive witnesses.

1. Object to non-responsive answers.

2. Break questions down.

3. Persist.

4. Alert the witness to the proposition that you will not conclude the deposition without responsive answers. (“Shall we break for supper or keep going?”)

(f) Inquire about the witness’ knowledge of other discoverable information.

(g) Respond appropriately to objections.

1. Listen/learn. Re-phrase if you should.

2. Get an answer nonetheless. “You may answer the question."

3. Alert opposing counsel that you know the rules. "Are you instructing the witness not to answer?"

4. Make a complete record. "Are you refusing to answer and, if so, are you doing so on advice of counsel?"

(h) Listen to the answer (you may learn something).

(i) Take notes. Review and ask follow-up questions before concluding your examination.

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24TH FEDERAL LITIGATION COURSE

DISCOVERY SEMINAR MATERIALS

The following materials are provided for the discovery seminar exercises.

1. Seminar vignette and problem exercises.

2. Plaintiff's First Interrogatories to Defendant United States.

3. Notice of Deposition.

4. Extract from 10 U.S.C. § 1102.

Review the materials and prepare the six discovery exercise problems for discussion.

24TH Federal Litigation

Discovery Seminar Materials

Seminar vignette:

Pamela Peterson is the 17-year-old daughter of a medically retired – and now deceased – Air Force officer. When she was 16, Pamela suffered a tear of the meniscus in her right knee during high school basketball practice. She was seen at a medical clinic at Fort Meade and scheduled for arthroscopic surgery to repair it.

LTC (Dr.) Farrington Pearl, III, a board certified orthopedic surgeon, performed the arthroscopy. According to LTC Pearl, the operation was uneventful and he noticed no problems during surgery. The procedure was also recorded by digital videography on the hospital's information system.

While Pamela was in post-operative recovery, she began complaining about excruciating pain in her foot and calf. MAJ (RN) Lemaire Farris dismissed Pamela's complaints as ordinary post-operative pain amplified through the psyche of a teenager. Four hours post-operatively, nurses were unable to detect a pedal pulse in Pamela's right leg. Subsequent evaluation disclosed that Pamela was suffering compartment syndrome in her right calf. An emergent fasciotomy was performed to relieve the pressure. Vascular studies were also performed. These identified a defect in the femoral artery at the level of the knee.

Shortly after the severed artery was detected, emergency vascular surgery was performed to repair the artery. Unfortunately, Pamela suffered a nerve injury secondary to compartment syndrome in her right calf which left her with a foot drop and permanent partial disability in her right leg. Her right leg is also significantly scarred.

Pamela's mother, Mrs. Lynette Peterson, retained Bart Fitzhugh, a former Army JAG, to represent her in the litigation. Bart filed an administrative claim and, after the 6 month period elapsed, filed an action against the United States in the U.S. District Court for the District of Maryland, claiming damages of $15 million.

Your review of the WWW page for the local paper notes that last year (Pamela's junior year in high school), she was named to the all-county basketball team as well as the academic all-state team. The article notes that she was being recruited by the University of Maryland, Georgetown, the Naval Academy and Notre Dame. It also claimed she was ranked third in her high school class (of 643 students).

You have worked closely with the AUSA on several previous cases. She's overworked and underpaid and, having seen your prior work product, increasingly receptive to your substantial participation in this case. In fact, in your first phone call with her, the AUSA informs you that discovery in this case "is your baby."

You interview LTC Pearl (who was recently reassigned to Heidelberg, FRG) by telephone. LTC Pearl informs you that he does not believe that he severed the patient's femoral artery, but he has no good explanation for how the injury occurred. He reports being involved in two other FTCA claims. One was never the subject of any litigation; the other resulted in a nuisance ($50,000) payment. The first claim involved an alleged failure (by LTC Pearl) to diagnose a wrist fracture in an adult patient. He had seen the patient in clinic and referred the patient to a radiologist who misread the film. The admin claim asserted that LTC Pearl failed to diagnose the fracture, but provided no additional details. No litigation was pursued. The second claim asserted that LTC Pearl avulsed a nerve root while performing a hemi-laminectomy (spine surgery) on another adult patient. LTC Pearl was the attending physician at WRAMC for this patient, but a senior resident, not LTC Pearl, actually performed the surgery. Pearl asserts that he was named because he was the attending. He also alleges that the payment was made only because the senior resident had some "personality issues" and the AUSA in that case was afraid to take the case to trial.

LTC Pearl informs you that the digital video recordings of arthroscopies were routinely destroyed several weeks after the procedure (they were actually overwritten by other procedures). Occasionally, the patient would request a videotape recording of his or her surgery and, if the patient supplied a tape, these would be made contemporaneously with the digital version. LTC Pearl is aware that the morbidity and mortality committee reviewed the digital recording, excerpted certain frames and included these in a committee report. He does not believe that they maintained a copy of the complete recording. Your conversation with the risk manager of the hospital confirmed that the entire recording was destroyed, but that that committee retained certain frames, which were of particular interest to them.

MAJ Lemaire Farris left the Army shortly after the Peterson surgery. While he was a competent OR nurse, it seems he had difficulty keeping his hands off of some of the female employees in the hospital. In fact, two female civilian nurses brought a sexual harassment claim against the Army based, in large part, on the misconduct of MAJ Farris. The case was tried in the District Court for the District of Columbia and resulted in a $250,000 award. The case made headlines in the Washington Post (Metro section) on at least 3 days.

Seminar Exercise No. 1:

Fashion – and be prepared to articulate – your strategy for the Rule 26(f) conference. Assume that the court will set trial in August 2005.

Seminar Exercise No. 2:

Prepare objections and answers to plaintiff's first interrogatories. For any interrogatories for which you are unable to provide a substantive response, provide a plan of action to acquire the necessary information.

Seminar Exercise No. 3:

Prepare correspondence replying to Bart Fitzhugh's notice of deposition. Your letter should preserve objections and comply with your duty to attempt to resolve any discovery difficulties without court intervention.

Seminar Exercise No. 4:

Draft a request for production to the plaintiff consisting of at least four requests.

Seminar Exercise No. 5:

Identify six areas of questioning to be explored with the plaintiff (Pamela) and briefly outline the questions to be asked in each area.

Seminar Exercise No. 6:

Draft five interrogatories to be addressed to the plaintiff, at least one of which is a contention interrogatory.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

PAMELA PETERSON, a minor, by her next friend and guardian, LYNETTE PETERSON,	)	
Plaintiff	)	
v.	)	Civil Action No. 04:cv1459
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S FIRST INTERROGATORIES
TO DEFENDANT UNITED STATES OF AMERICA

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that defendant United States of America answer the following interrogatories within 30 days after service of this document.

PRELIMINARY INSTRUCTIONS

A. Defendant's responses to these interrogatories must include matters within defendant's personal knowledge as well as those matters within the possession of, or obtainable by, defendant, defendant's attorney(s), investigators, representatives, or anyone acting on behalf of either defendant or defendant's attorney(s).

B. These interrogatories are to be regarded as continuing and you must provide, by way of supplementary responses, such additional information as may hereafter be obtained by you or any person acting on your behalf, stating the basis upon which you now know that the prior responses or answers were incomplete, incorrectly made or whether correctly made are no longer true. Such supplementary answers are to be filed and served within 15 days after receipt of such information, but not later than the time of trial.

C. If any of these interrogatories cannot be answered in full, you must answer to the fullest extent possible and provide an explanation for your inability to respond more fully.

D. For each interrogatory for which a response is provided, identify each and every individual who provided information or assistance in preparing the response.

E. For each interrogatory for which a response is provided, identify each document which was considered, reviewed, or evaluated in preparing the response and attach any such documents identified.

F. For any interrogatory to which you assert an objection, describe fully the grounds for objection sufficiently that the Court and the plaintiff can understand, assess and evaluate the basis for the assertion of the objection. If such objection concerns a document, identify each such document.

DEFINITIONS

a. The term "health care provider" as used in this request includes every physician, nurse, corpsman, medical technician, medical student, physician's assistant, and all other persons providing medical care.

b. The term "you" refers to the defendant United States of America and where the context permits, its attorneys, agents and employees.

c. Document as used in these interrogatories should be construed in its broadest sense and means:

(1) all writings of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation, correspondence, memoranda, notes, worksheets, diaries, statistics, letters, telegrams, telex, telefax, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, notations of any sort regarding conversations, telephone calls, meetings or other communications, bulletins, printed matter of any kind and all forms of drafts, notations, markings, alterations, modifications, changes and amendments of any of the foregoing;

(2) graphical or aural records or representations of any kind, (including, without limitation, photographs, charts, x-rays or other radiographic images, graphs, videotape, recordings and motions pictures), and the electronic, mechanical or electrical records or representations of any kind (including, without limitation, tapes, cassettes, discs and recordings).

d. To “identify” a person means to state his or her full name, current or last known business address, telephone number, employer, and job position and title or rank at all times material to the occurrences giving rise to the Complaint.

e. To “identify” an entity or organization, means to indicate the name, address of its principal facility or facilities, telephone number and to identify the general manager or other person affiliated with the entity or organization who has supervisory responsibilities for the entity or organization.

f. To “identify” a document means to set forth the general nature of the document (i.e. whether it is a letter, memorandum, report, etc.), to identify its author, recipients, and its present custodian, and to provide its date of preparation.

g. To “describe” means to provide a comprehensive, full, frank, complete, accurate, and detailed explanation of the matter inquired of, so as to relay all significant responsive information known or believed to exist concerning the matter by the person(s) responding.

INTERROGATORIES

Interrogatory No. 1: Set forth in complete detail how you contend the plaintiff’s femoral artery was severed, indicating the precise mechanism by which it was severed, the time and date it was severed, any surgical tools or instruments which were being applied at the time that it was severed and identify the person(s) who were manipulating or using such tools or instruments at the time the artery was severed.

Answer:

Interrogatory No. 2: Identify each expert witness you have consulted or who you may call at trial. For each such expert, set forth his qualifications, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify, and state a summary of the grounds for each opinion.

Answer:

Interrogatory No. 3: Identify each and every action in which any of the following were defendants and identify every claim or judgment paid, the basis for which was, in whole or in part, negligence or misconduct by any of the following:

(a) Lieutenant Colonel Farrington Pearl, III, M.D.

(b) Major Lemaire Farris, R.N.

Answer:

Interrogatory No. 4: Identify each and every person likely to have discoverable information relevant to disputed facts alleged in the Complaint, separately setting forth the subject of the information about which each person identified has knowledge.

Answer:

Interrogatory No. 5: Identify each and every document you contend supports your allegation that LTC Pearl was not negligent in performing arthroscopic surgery on Pamela Peterson.

Answer:

Respectfully submitted,

_____

Bart Fitzhugh, Esquire
The People's Law Firm, PLLC
1212 W. Broad Street
Baltimore, MD 21200

CERTIFICATE

The undersigned certifies that the foregoing document was forwarded by telecopier and first class mail, postage prepaid to Janice W. Burnside, Assistant U.S. Attorney, District of Maryland, Baltimore MD 21119 this 30th day of July 2004.

_____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

PAMELA PETERSON, a minor, by her next friend and guardian, LYNETTE PETERSON,	)	
Plaintiff	)	
v.	)	Civil Action No. 04:cv1459
UNITED STATES OF AMERICA,	)	
Defendant.	)	

NOTICE OF DEPOSITION

Please take notice that, in accordance with Federal Rule of Civil Procedure 30(b)(6), the deposition upon oral examination of Lieutenant Colonel Farrington Pearl, III, M.D., U.S. Army, will be taken before an officer authorized to administer oaths at the law offices of The People's Law Firm, PLLC, 1212 W. Broad Street, Fayetteville, NC 27888, beginning at 10:00 a.m., August 9, 2003 and continuing from day to day until completed.

The matters upon which LTC Pearl will be questioned will include, but are not limited to:

a. the arthroscopic surgery performed on Pamela Peterson;

b. the techniques for arthroscopic surgery;

c. informed consent;

d. the risks attendant to arthroscopic surgery;

e. LTC Pearl's training and experience in arthroscopic surgery.

YOU ARE INVITED TO ATTEND AND PARTICIPATE AS YOU SEE FIT.

Respectfully submitted,

_____

Bart Fitzhugh, Esquire
The People's Law Firm, PLLC
1212 W. Broad Street
Baltimore, MD 21200

CERTIFICATE

The undersigned certifies that the foregoing document was forwarded by telecopier and first class mail, postage prepaid to Janice W. Burnside, Assistant U.S. Attorney, District of Maryland, Baltimore, MD 21119 this 30th day of July 2004.

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Section 1102. Confidentiality of medical quality assurance records: qualified immunity for participants

(a) **Confidentiality of Records.** - Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).

(b) **Prohibition on Disclosure and Testimony**. - (1) No part of any medical quality assurance record described in subsection (a) may be subject to discovery or admitted into evidence in any judicial or administrative proceeding, except as provided in subsection (c). (2) A person who reviews or creates medical quality assurance records for the Department of Defense or who participates in any proceeding that reviews or creates such records may not be permitted or required to testify in any judicial or administrative proceeding with respect to such records or with respect to any finding, recommendation, evaluation, opinion, or action taken by such person or body in connection with such records except as provided in this section.

(c) **Authorized Disclosure and Testimony**. - (1) Subject to paragraph (2), a medical quality assurance record described in subsection (a) may be disclosed, and a person referred to in subsection (b) may give testimony in connection with such a record, only as follows:

(A) To a Federal executive agency or private organization, if such medical quality assurance record or testimony is needed by such agency or organization to perform licensing or accreditation functions related to Department of Defense health care facilities or to perform monitoring, required by law, of Department of Defense health care facilities.

(B) To an administrative or judicial proceeding commenced by a present or former Department of Defense health care provider concerning the termination, suspension, or limitation of clinical privileges of such health care provider.

(C) To a governmental board or agency or to a professional health care society or organization, if such medical quality assurance record or testimony is needed by such board, agency, society, or organization to perform licensing, credentialing, or the monitoring of professional standards with respect to any health care provider who is or was a member or an employee of the Department of Defense.

(D) To a hospital, medical center, or other institution that provides health care services, if such medical quality assurance record or testimony is needed . . . . to assess the professional qualifications of any health care provider . . . .

(E) To an officer, employee, or contractor of the Department of Defense . . . .

(F) To a criminal or civil law enforcement agency . . . .

(G) In an administrative or judicial proceeding commenced by a criminal or civil law enforcement agency

. . . .

(h) **Application to Information in Certain Other Records.** - Nothing in this section shall be construed as limiting access to the information in a record created and maintained outside a medical quality assurance program, including a patient's medical records, on the grounds that the information was presented during meetings of a review body that are part of a medical quality assurance program.

24TH FEDERAL LITIGATION COURSE

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

I. INTRODUCTION.

A. Types of Injunctive Relief.

1. Temporary Restraining Order [TRO].

2. Preliminary Injunction.

3. Permanent Injunction.

II. TEMPORARY RESTRAINING ORDERS.

A. General.

1. Purpose: prevent irreparable injury to moving party until court can hear motion for preliminary injunction.

2. Governing rules Fed. R. Civ. P. 65(b); RCFC 65(b).

B. Procedure.

1. Notice.

a. General rule: notice is required before entry of a TRO. E.g., Thompson v. Ramirez, 597 F. Supp. 726 (D.P.R. 1984).

--Notice to successful bidder. RCFC 65(f)(2).

b. Exception:

(1) Movant will suffer irreparable injury if adverse party afforded opportunity to be heard; and

(2) Movant's attorney certifies efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b); RCFC 65(b). United States v. Jenkins, 974 F.2d 32 (5th Cir. 1992).

c. Reality.

2. Term of the order: 10 days, with possible 10 day extension. Fed. R. Civ. P. 65(b); RCFC 65(b).

3. Security. Fed. R. Civ. P. 65(c); RCFC 65(c).

4. Moving for hearing for preliminary injunction -- takes precedence over other matters. Fed. R. Civ. P. 65(b); RCFC 65(b).

5. Burden of proof.

a. General. Burden of proof is on the moving party. Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969); Colorado Environmental Coalition v. Bureau of Land Management, 932 F.Supp. 1247, 1251 (D. Colo. 1996) (citing Seaborg).

b. Elements. The standard four prong test for injunctive relief (Trucke v. Erlemeier, 657 F. Supp. 1382, 1389 (N.D. Iowa 1987) (citing Younger v. Harris, 401 U.S. 37 (1970)); Minneapolis Urban League v. City of Minneapolis, 650 F. Supp. 303 (D. Minn. 1986)):

(1) Substantial likelihood of success on the merits.

(2) Irreparable injury to movant if relief is denied.

(3) Relative harm to the opposing party (balance of harms).

(4) Impact on the public interest.

6. Appeal.

a. General rule: orders granting, denying, modifying, or dissolving TROs are not appealable. E.g., Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates, 964 F.2d 599 (7th Cir. 1992); Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982).

b. Exceptions:

(1) Extension of TRO substantially beyond time limits of Rule 65(b). Sampson v. Murray, 415 U.S. 61 (1974); United States v. Board of Education of City of Chicago, 11 F.3d 668 (7th Cir. 1993).

(2) Grant or denial of the TRO effectively moots the case. United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971).

(3) TRO issued following notice and hearing. Religious Technology Center v. Scott, 869 F.2d 1306, 1308 (9th Cir. 1989).

III. PRELIMINARY INJUNCTIONS.

A. General.

1. Purpose: prevent irreparable injury during pendency of lawsuit.

2. Governing rules: Fed. R. Civ. P. 65(a); RCFC 65(a).

B. Procedure.

1. Notice and hearing. Fed. R. Civ. P. 65(a)(1); RCFC 65(a)(1). United States v. Board of Education of City of Chicago, 11 F.3d 668 (7th Cir. 1993).

a. Type of hearing. See, e.g., Drywall Tapers and Pointers of Greater New York v. Local 530 of Plasterers and Cement Masons International Association, 954 F.2d 69 (2d Cir. 1992); International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986).

b. Consolidation of trial on the merits. Fed. R. Civ. P. 65(a)(2); Abraham Zion Corp. v. Lebow, 761 F.2d 93, 100-1 (2d Cir. 1985). Cf. Berry v. Bean, 796 F.2d 713, 719 (4th Cir. 1986) (consolidation of merits on appeal).

2. Security. Fed. R. Civ. P. 65(c); RCFC 65(c).

3. Appeal.

a. Orders granting, denying, modifying, or dissolving preliminary injunctions are appealable. 28 U.S.C. § 1292(a)(1).

b. Standard of appellate review: abuse of discretion. See, e.g., McKeesport Hospital v. Accreditation Council for Graduate Medical Education, 24 F.3d 519 (3d Cir. 1994); King v. Innovation Books, 976 F.2d 824, 828 (2d Cir. 1992); Abbott Labs v. Mead Johnson Co., 971 F.2d 6, 12 (7th Cir. 1992); Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986).

c. Appellate forum. 28 U.S.C. §§ 1292(c); 1295(a)(2).

C. Burden of Proof

1. Burden is on the moving party. Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers, 415 U.S. 423 (1974).

2. Elements. See generally Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991), rev'g, 747 F. Supp. 1160 (E.D.N.C. 1990); Cunningham v. Adams, 808 F.2d 815 (11th Cir. 1987); Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985).

a. Substantial likelihood of success on the merits. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991), rev'g, 747 F. Supp. 1160 (E.D.N.C. 1990); Berry v. Bean, 796 F.2d 713 (4th Cir. 1986); Tremblay v. Marsh, 750 F.2d 3 (1st Cir. 1985), rev'g, 584 F. Supp. 224 (D. Mass. 1984).

b. Irreparable injury to the movant if relief is denied.

(1) Discharge from government employment. Sampson v. Murray, 415 U.S. 61 (1974); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991), rev'g, 747 F. Supp. 1160 (E.D.N.C. 1990). Cf. Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991). But cf. Tully v. Orr, 608 F. Supp. 1222 (E.D.N.Y. 1985).

(2) Involuntary military service. Patton v. Dole, 806 F.2d 24 (2d Cir. 1986).

(3) Preserving a damages remedy. See, e.g., Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987); Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355-56 (10th Cir. 1986); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52-53 (1st Cir. 1986).

(4) Alleged constitutional deprivations. Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion); Covino v. Patrissi, 967 F.2d 731 (2d Cir. 1992); Mariani Giron v. Acevedo Ruiz, 834 F.2d 238 (1st Cir. 1987).

(5) Loss of government contract; loss of ability to compete for contract. E.g., M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

(a) Plaintiff can recover bid preparation costs. Morgan Business Assoc. v. United States, 619 F.2d 892 (Ct. Cl. 1980). Compare Ainslie Corp. v. Middendorf, 381 F. Supp. 305 (D. Mass. 1974), with Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975).

(b) Plaintiff cannot recover anticipated profits. Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970). See DLM & A, Inc. v. United States, 6 Cl. Ct. 329 (1984).

(c) Court generally will not order the award of a contract to a successful plaintiff. Delta Data Sys. Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984); Golden Eagle Refining Co. v. United States, 4 Cl. Ct. 613 (1984). But cf. Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052 (1st Cir. 1987).

c. Relative harm to the opposing party.

(1) Discharge from government service. Pauls v. Secretary of the Air Force, 457 F.2d 294 (1st Cir. 1972).

(2) Bid protests. Design Pak, Inc. v. Secretary of the Treasury, 801 F.2d 525 (1st Cir. 1985); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

(a) Expiration of bids. See Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517 (1987).

(b) End of fiscal year.

(c) Impairment of government program.

(d) Interest in smooth, uninterrupted procurement process.

(e) Injury to third parties (successful bidder).

(f) Loss of money already expended on contract (post-award). See Solon Automated Serv., Inc. v. United States, 658 F. Supp. 28 (D.D.C. 1987).

d. Impact on the public interest.

"But where an injunction is asked which will adversely affect a public interest, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the right of the parties, though the postponement may be burdensome to the plaintiff."

--Yakus v. United States, 321 U.S. 414, 441 (1944).
See also Pruner v. Department of Army, 755 F. Supp. 362 (D. Kan. 1991) (Injunctive relief pending military's processing of conscientious objector application "would seriously interfere with

the public interest in efficient deployment of troops in connection with Operation Desert Shield.").

But see, Haitian Centers Council v. McNary, 969 F.2d 1326 (2d Cir. 1992). (the government may not assume that the public interest lies solely with it.)

3. Variations on the general rule:

a. D.C. Circuit: "Under the well known standard set forth in this Circuit, four factors control the Court's discretion to grant a motion for a preliminary injunction: the likelihood that the plaintiff will prevail on the merits, the degree of irreparable injury that the plaintiff will suffer if the injunction is not issued, the harm to the defendant if the motion is granted, and the interest of the public. . . In the event that the last three factors favor the issuance of an injunction, a movant can satisfy the first factor by raising a serious question on the merits of the case."

--Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

b. 1st Circuit: "We recognize that a finding attributing great weight to one of the four components may make up for a relatively weak finding as to another. If the chances of success are good, but not the highest, and the adverse effect on the public interest very serious should the prognostication prove mistaken, the public interest might require that the injunction be denied."

--Mariani Giron v. Acevedo Ruiz, 834 F.2d 238, 240 (1st Cir. 1987).

c. 2d Circuit: "The standard in this Circuit for the issuance of a preliminary injunction requires the moving party to establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious ground for litigation and a balance of the hardships tipping decidedly in its favor."

--Britt v. United States Army Corps of Eng'rs, 769 F.2d 84 (2d Cir. 1985).

d. 3d Circuit: Plaintiff must show both likelihood of success on the merits and probability of irreparable harm, and the district court

should consider the effect of issuance of injunction on other interested persons and the public interest.

--Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86 (3d Cir. 1992).

e. 4th Circuit: "On a motion for a preliminary injunction, the district court is first to balance the likelihood of harm to the plaintiff if the temporary injunction is not issued against the likelihood of harm to the defendant if the injunction is issued. If the harm to the plaintiff greatly outweighs the harm to the defendant, then enough of a showing has been made to permit the issuance of an injunction, and the plaintiff need not show a likelihood of success on the merits, for a grave or serious question is sufficient. But as the harm to the plaintiff decreases, when balanced against harm to the defendant, the likelihood of success on the merits becomes important."

--Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985); Blackwelder Furniture Co. v. Selig Mfg. Co., 550 F.2d 189 (4th Cir. 1977); see also, Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

f. 5th Circuit: The four prerequisites for the relief of a preliminary injunction are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) the threatened injury to plaintiff must outweigh the threatened harm the injunction may do to defendant, and (4) granting the preliminary injunction will not disserve the public interest.

--Wiggins v. Secretary of the Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991).

g. 6th Circuit: Where factors other than likelihood of success on the merits all are strongly in favor of a preliminary injunction, an injunction may be issued if the merits present a sufficiently serious question to justify further investigation.

--In re Delorean Motor Co., 755 F.2d 1223, 1230 (6th Cir. 1985).

h. 7th Circuit: "P x H > (1 - P) x H."

[A district court may grant a preliminary injunction "only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error."]

--American Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589 (7th Cir. 1985). See also Schultz v. Frisby, 807 F.2d 1339, 1343 (7th Cir. 1986), aff'd on rehearing, 822 F.2d 642 (7th Cir. 1987) (en banc); Roland Mach. Co. v. Dresser Ind., Inc., 749 F.2d 380, 386-88 (7th Cir. 1984).

i. 8th Circuit: "[T]he essential inquiry in weighing the propriety of issuing a preliminary injunction is whether the balance of other factors tips decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for more deliberate investigation."

--General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 624-25 (8th Cir.1987).

j. 9th Circuit: "To succeed on a motion for a preliminary injunction the movant must show 'either (1) a combination of probable success on the merits and a possibility of irreparable injury or (2) that serious questions are raised and the balance of the hardships tips sharply in the moving party's favor.'"

--Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986), quoting Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). But cf. Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985) (Sampson v. Murray controls in public employment cases).

k. 10th Circuit: "Where the movant for a preliminary injunction prevails on the factors other than likelihood of success on the merits, it is ordinarily sufficient that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."

--City of Chanute v. Kansas Gas & Electric Co., 754 F.2d 310, 314 (10th Cir. 1985); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

l. 11th Circuit: To obtain a preliminary injunction, the plaintiff must prove: (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that the injury to the moving party from denial of injunctive relief outweighs the damage to the other party if it is granted; and (4) that the injunction will not harm the public interest.

--GSW, Inc. v. Long County, Georgia, 999 F.2d 1508 (11th Cir. 1993).

m. Fed. Circuit: In determining whether to issue a preliminary injunction, there are four relevant factors: (1) degree of immediate irreparable harm to the plaintiff; (2) degree of harm to the party to be enjoined; (3) the impact of the injunction on public policy considerations, and (4) the likelihood of plaintiff's ultimate success on the merits. These competing elements must be simultaneously weighed.

--We Care, Inc. v. Ultra-Mark, International Corp. 930 F.2d 1567 (Fed. Cir. 1991).

IV. PREPARING THE GOVERNMENT'S RESPONSE.

A. Gathering Facts, Documents, and Experts.

B. Strategy -- Government's Options.

C. Defenses.

1. Facts.

2. Legal issues.

V. CONCLUSION.

24TH FEDERAL LITIGATION COURSE

Negotiations and Alternative Dispute Resolution (ADR)*

I. LITIGATION NEGOTIATIONS.

A. Why negotiate?

1. Negotiate to achieve a favorable settlement. Most civil cases settle. Therefore, settlement is not an alternative to litigation, it is a normal outcome of litigation.

2. Settlement saves litigation costs and may avoid other adverse consequences of further litigation, *e.g.*,"bad" press; adverse impact on training and morale; adverse judgment.

3. Settlement is a *flexible* tool. Settlement may afford the parties more creative solutions to resolving their disputes than a judgment after trial would allow. In other words, in negotiating a settlement to litigation, the parties are generally free to craft individualized, nontraditional remedies.

4. Even if negotiations to settle a lawsuit fail, negotiations may be used to help develop the case for trial.

B. Basic Litigation Negotiation Principles.

1. Timing.

a. There are reasons to negotiate at every stage of litigation. (For example, pre-suit you may want to test your facts or educate the other side.)

b. Don't force the other side to prepare its case. Encourage them to invest energy in the settlement process.

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c. The content and timing of depositions and motions affects negotiations.

d. Continue to litigate. Use negotiations to get discovery and to test your theories.

2. Stages and Styles.

a. Most negotiations go through three stages: information exchange, competition, concession.

b. Try to build rapport with the other side so that you can obtain more information, have credibility when arguing, and facilitate concessions.

c. Do not rush the process. Allow for give and take so that both sides get some satisfaction from the process.

d. Be yourself, but be flexible. Vary your style based on your needs and on your opponent's style.

3. Psychology and Motivation.

a. Communicate (directly or indirectly) to the opposing party, not just opposing counsel.

b. Know the "who, how, what, and why" a case settles. Find out as much as you can from the opposition. If you listen, the other side will talk.

c. Get the opposition (both the lawyer and the client) to invest in the settlement effort. Give the other side homework.

d. Maintain your credibility.

e. To improve cooperation, listen carefully and insure that the other side knows that you are paying attention.

4. Offers.

a. Expectations affect the outcome of negotiations. Do your best to influence the opposition's expectations.

b. Recognize the advantage of opening in setting expectations. Start as high or low as you can reasonably justify.

c. Make offers that have two choices. (For example: "If you don't take this offer, then let's begin depositions.")

d. How an offer is conveyed is as important as the offer. Reasons for an offer should be conveyed before the offer, but those reasons should only be enough to explain the offer and frame the dispute.

5. Give and take.

a. Ask the other side to explain/justify its number.

b. Always be prepared to walk away, but never say, "take it or leave it."

c. Leave yourself time and room to negotiate.

II. ALTERNATIVE DISPUTE RESOLUTION.

A. Definition.

"Alternative Dispute Resolution" ("ADR") means any procedure, involving a neutral, that is used in lieu of trial to resolve one or more issues in controversy.

B. DOJ Policy.

"The goal of USAs as participants in ADR and during other settlement discussions shall be as follows: In consultation with the client, to weigh the magnitude and likelihood of all costs, risks, and benefits associated with nonsettlement versus participation in ADR and to consider the best interests of the client and the government, and -- through voluntary settlement and/or ADR, if possible and cost efficient -- to achieve the most favorable result reasonably obtainable under the circumstances on behalf of the client, consistent with applicable law and the highest standards of fairness, justice and equity." Fed. Reg. Vol. 61, No. 136 (July 15, 1996) 36909.

C. ADR Techniques.

1. Arbitration.

a. A flexible adjudicatory dispute resolution process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited adversarial hearing.

b. Either party may reject the nonbinding ruling and request a trial *de novo*.

2. Early Neutral Evaluation.

The process of bringing all parties and their counsel together early in the pretrial phase of litigation to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral evaluator with subject-matter expertise, usually an attorney, who may also provide case planing guidance and, if requested by the parties, settlement assistance.

3. Judicial Settlement Conference.

A settlement conference before a judge or magistrate judge, who, upon hearing summaries of each party's case and applicable law, may articulate opinions about the merits of the case or otherwise facilitate the trading of settlement offers by mediatory or other techniques.

4. Mediation.

A flexible, nonbinding process in which a neutral third party, the mediator, facilitates negotiations among the parties to help them reach a settlement.

5. Minitrial.

A flexible, nonbinding hearing in which counsel for each party informally presents a shortened form of its case to settlement authorized representatives of the parties in the presence of a presiding judge, magistrate judge, or other neutral, at the conclusion of which the representatives meet to negotiate a settlement.

6. Summary bench trial.

   A pretrial procedure intended to facilitate settlement consisting of the summarized presentation of the case to a judicial officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations.

7. Summary jury trial.

   A flexible nonbinding procedure which involves a short hearing in which evidence is presented by counsel in summary form to a jury. Following the evidentiary presentation, the jury returns an advisory verdict that forms the basis for settlement negotiations.

D. Factors to consider when determining whether and when to use ADR.

1. The parties' purpose in filing the lawsuit demonstrates an agenda separate from the specific issues in the case.
2. Case procedural history, i.e., what administrative proceedings have preceded the filing in court.
3. Assessment of likely outcome including likelihood of appeal.
4. Where is the case in the discovery process? Has all of the information necessary to settle the case been discovered?
5. Where is the United States in terms of procuring settlement authority? Is more information necessary before authority can be obtained?
6. Who is in charge of the litigation, parties or counsel?
7. Are factual disputes significant?
8. Are legal disputes significant?
9. Are parties individuals, corporations or other governmental entities, and how does that affect their ability to participate in the ADR process?
10. Witness credibility and its impact on the litigation.
11. Are there individuals or entities with interests in the outcome who are not parties to the case?
12. There has been prior extensive administrative process.
13. Position on the court docket.
14. Expenses of litigation versus expenses of ADR.

III. CONCLUSION.

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24TH FEDERAL LITIGATION COURSE

ALTERNATE DISPUTE RESOLUTION DEMONSTRATION

The Honorable William Connelly, United States Magistrate Judge, United States District Court, District of Maryland, and ADA faculty will conduct a mock settlement conference in the fictitious Federal Tort Claims Act case of Peterson v. United States.

Setting: It is Thursday, August 3, 2006, at 4 p.m. and you have a bird's eye view of Judge Connelly's chambers, Federal Courthouse, Greenbelt, Maryland.

Procedural Posture: The action has been set for pre-trial on November 17, 2006, and for trial before the Honorable James K. Bredar, United States District Judge, for the trial period commencing December 15, 2006. The case is number 21 on the trial docket.

Materials: Order Scheduling Settlement Conference and the parties' *ex parte* letters to the Court.

Exercise: Critically observe the conference, and ask yourself the following questions:

> What conduct was particularly effective in achieving settlement or at least moving the parties towards settlement? What conduct was particularly ineffective?
>
> What would you have done differently as counsel for the government/defendant?
>
> Was this case appropriate for a judicial settlement conference? Would another ADR technique have been appropriate?

United States Department of Justice
Office of the United States Attorney
District of Maryland

July 21, 2006

The Honorable William Connelly
United States Magistrate Judge
6500 Cherrywood Lane
Greenbelt, MD 20770

Re: Settlement Conference, August 4, 2005
Pamela Peterson v. United States
Civil Action 03:cv1459

Dear Judge Connelly:

The Defendant, the United States of America, submits the following in response to your July 1, 2006, letter regarding the settlement conference scheduled for August 3, 2006, at 4 p.m.

Facts.

Plaintiff Pamela Peterson presented to the U.S. Army medical clinic at Fort Meade, Maryland, on January 15, 2003, with a knee injury that she reportedly sustained playing basketball. U.S. Army Lieutenant Colonel Farrington Pearl, III, M.D., a board certified orthopedic surgeon, treated the Plaintiff and diagnosed a tear of the meniscus in Plaintiff's right knee.

Dr. Pearl recommended arthroscopic surgery to repair the torn meniscus. He also advised Plaintiff and her mother that, instead of surgery, they could take a "wait and see" approach with the probable outcome that the Plaintiff would have chronic knee pain and would be limited in her physical activities for life. After a lengthy discussion concerning the risks of surgery, and the prognosis for recovery, Plaintiff and her mother elected to have the surgical repair.

The arthroscopic surgery was duly scheduled and performed by Dr. Pearl on January 18, 2004, at Walter Reed Army Medical Center, Washington, D.C. Neither Dr. Pearl nor anyone on the surgical team noted any complications, and, indeed, Dr. Pearl's surgical notes describe the procedure as "routine" and "uneventful."

While in the recovery room after the surgery, Plaintiff complained to her mother and the attending nurse, U.S. Army Major Lemaire Farris, R.N., of pain in her right leg. All of the medical professionals, including Plaintiff's expert witnesses, will testify that

pain is a common complaint when anesthesia wears off during the post-operative period. Plaintiff's complaints of pain in her right leg were therefore not unexpected nor were they a reason for alarm. Nurse Farris appropriately administered additional pain medication to the Plaintiff.

Although Nurse Farris does not have a specific recollection of treating the Plaintiff, he will testify that he always performs a physical examination on his patients post-operatively, especially if they have any complaints of pain. He does not recall, nor do his post-operative notes include, any unusual findings. Nurse Farris will testify that if there were any unusual symptoms or findings on physical examination of the patient, they most certainly would have been noted in the medical records.

Approximately four hours after the surgery, and after Nurse Farris' recovery room shift ended, one of the nurses caring for the Plaintiff was unable to detect a pedal pulse in Plaintiff's right foot. Dr. Pearl was promptly notified and he determined that the Plaintiff was suffering from compartment syndrome in her right leg. A fasciotomy of the Plaintiff's right calf was performed to relieve the compartment syndrome. Vascular studies revealed a right femoral artery defect which was successfully repaired by Army surgeons.

Unfortunately, Plaintiff suffered a nerve injury in her right leg, which causes a right foot drop. Otherwise, Plaintiff made a full recovery and she enjoys an active lifestyle.

Plaintiff theorizes that the Plaintiff's femoral artery was mistakenly severed by Dr. Pearl during the arthroscopic surgery. However, Plaintiff's evidence of this crucial fact is circumstantial and highly speculative. Because the severed artery was detected shortly after the surgery, Plaintiff's expert witness, Dr. Cardea, *assumes* that Dr. Pearl accidentally cut it during the surgery. Dr. Cardea also *assumes* that Dr. Pearl was negligent in failing to detect the severed artery prior to closure since, according to Dr. Cardea, Dr. Pearl should have seen blood from the severed artery in the surgical field.

Dr. Pearl has performed over 1,000 arthroscopic knee surgeries without incident. He will testify that he is certain that he did not inadvertently cut Plaintiff's femoral artery. Dr. Pearl will further testify that throughout Plaintiff's procedure, he had direct visualization of the cutting instruments and there was no blood in the operative field prior to closure.

Dr. Bo Kagan, a board certified orthopedic surgeon from Johns-Hopkins Medical Center, will testify that the Plaintiff's injury may have occurred without any surgical mistake. Dr. Kagan will testify that the Plaintiff may suffer from a rare but recognized congenital anomaly, which causes diverse weakness in the vascular tissue. These weakened vessels may rupture spontaneously, or with only a minor traumatic disturbance, such as would be anticipated with arthroscopic surgery. Because Plaintiff's father died at age 38 from a ruptured aneurysm, it is quite likely that the Plaintiff does, indeed, have congenital defects in her arterial walls.

Plaintiff also theorizes that the Army breached the standard of care in failing to detect the Plaintiff's femoral artery defect until four hours after the arthroscopic surgery. Again, Plaintiff's evidence is circumstantial and highly speculative. Plaintiff assumes the arterial defect could have and should have been detected earlier, because, as noted above, Plaintiff erroneously assumes that the artery was severed during the arthroscopic surgery. Defendants' witnesses will testify that the Plaintiff was closely monitored post-operatively and the first sign of the arterial damage could not have been appreciated, absent vascular studies which were not indicated, any sooner than it was.

The evidence will show that the Plaintiff suffered an arterial rupture post-operatively. That rupture could not have been foreseen or prevented. Fortunately, the rupture was timely diagnosed and treated, minimizing Plaintiff's long term damages.

The Major Weaknesses in Each Side's Case.

Plaintiff. As noted above, Plaintiff's expert witness on the standard of care and causation bases his opinion on assumptions which are not supported by the testimony of the treating physician, Dr. Pearl.

Additionally, while Plaintiff has suffered a permanent nerve injury, she has made a remarkable recovery and the slight foot drop has not impeded her from enjoying an active lifestyle. While Plaintiff can no longer play basketball, she is able to walk with only a slight limp and she continues to enjoy sports such as bicycling, swimming and yoga. Additionally, she is an excellent student and is in line to receive a full academic scholarship for college in the fall. The government has provided all of the Plaintiff's medical care, at no cost to the Plaintiff. Plaintiff has no anticipated future medical expenses associated with her injury and she has no lingering pain. Additionally, she has no wage loss claim. Accordingly, her damages are minimal.

Defendant. There are some weaknesses in the Defendant's case as to the issue of causation. Although Dr. Pearl emphatically denies severing the Plaintiff's femoral artery, his operative notes do not expressly state that he visualized the femoral artery and determined that it was not in the surgical field before he excised the meniscus tear. Additionally, the operative notes do not affirmatively indicate that the field was clean before Dr. Pearl terminated the surgery. Dr. Pearl explains that he does not routinely include such matters in his operative notes, however, this will no doubt be an issue for impeachment.

Additionally, the congenital defect that may have predisposed the Plaintiff for the femoral artery injury is very rare and cannot be conclusively diagnosed. Defendant's expert witness, Dr. Kagan, concedes that the Plaintiff's injury may have been caused by a surgical accident. Finally, Nurse Farris' memory and post-operative notes are sparse, which supports the Plaintiff's claim that the government failed to timely diagnose Plaintiff's compartment syndrome.

Evaluation of the Maximum and Minimum Damage Awards Likely.

Assuming the Plaintiff can carry her burden of proof as to liability, the Defendant estimates a damage award in the range of $50,000 to $350,000.

Settlement Negotiations.

Plaintiff made a demand for $2.5 million which was rejected by the Defendant. Defendant has not counter-offered in that the Defendant disputes liability.

Attorney's Fees and Cost of Litigation.

Pursuant to the Federal Tort Claims Act, Plaintiff's attorney's fees are capped at 25% of the total damages award. The Defendant has no out-of-pocket attorney fee expenses as representation is provided by the United States Department of Justice.

The Defendant has approximately $10,000 in pre-trial discovery costs, including expert witness fees and witness travel expenses, and anticipates another $10,000 in costs through trial.

Client Representative at Settlement Conference.

Major John Bergen, United States Army, will attend the settlement conference as the Defendant's client representative. The undersigned and MAJ Bergen will have complete authority to enter into a binding settlement agreement within the range of authority of the United States Attorney for the District of Maryland.

Respectfully submitted,

Chuck R. Wilkins
United States Attorney

By John P. Moran
Assistant United States Attorney

UNITED STATES DISTRICT COURT
District of Maryland

William Connelly
United States Magistrate Judge

6500 Cherrywood Lane
Greenbelt, Maryland 20770
Office: (301) 344-0627
Fax: (301) 344-8434

July 1, 2006

Re: Pamela Peterson v. United States
Civil No. 03:cv1459

Dear Counsel:

Please be advised that a settlement conference in the above-captioned case has been scheduled for Thursday, **August 3, 2006, at 4 p.m.** to be held in my chambers (Room 355A). It is essential that the parties, or in the case of a corporation or partnership, an officer or other representative with complete authority to enter into a binding settlement, be present in person. Attendance by the attorney for a party is not sufficient. *See* Local Rule 607.3. Please also be advised that the conference may take the entire day.

No later than **July 21, 2006**, I would like to receive from each party a short letter candidly setting forth the following:

1. Facts you believe you can prove at trial;

2. The major weaknesses in each side's case, both factual and legal;

3. An evaluation of the maximum and minimum damage awards you believe likely;

4. The history of any settlement negotiations to date; and

5. Estimate of attorney's fees and costs of litigation through trial.

The letters may be submitted ex parte and will be solely for my use in preparing for the settlement conference. I also will review the pleadings in the court file. Additionally, if you want me to review any case authorities that you believe are critical to your evaluation of the case, please

identify. If you want me to review any exhibits or deposition excerpts, please attach a copy to your letter.[1]

The settlement conference process will be confidential and disclosure of confidential dispute resolution communications is prohibited. *See* 28 U.S.C. § 652(d); Local Rule 607.4. Also, for confidentiality purposes, **please do not** e-file your responses using our CM/ECF system.

Notwithstanding the informal nature of this letter, it is an Order of the Court and the Clerk is directed to docket it as such.

Very truly yours,

/s/

William Connelly
United States Magistrate Judge

[1] Please note that the American Bar Association Standing Committee on Ethics and Professional Responsibility has issued a Formal Opinion (No. 93-370) that precludes a lawyer, ABSENT INFORMED CLIENT CONSENT, from revealing to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. The opinion does not preclude a judge, in seeking to facilitate a settlement, from inquiring into those matters. Therefore, please discuss these items with your client before appearing for the settlement conference.

The People's Law Firm
1212 W. Broad Street
Baltimore, MD 21200

July 21, 2006

The Honorable William Connelly
United States Magistrate Judge
6500 Cherrywood Lane
Greenbelt, MD 20770

Re: *Pamela Peterson v. United States*
Civil Action 03:cv1459

Plaintiff's Submission Pursuant to Order Scheduling Settlement Conference

Dear Judge Connelly:

I represent the minor plaintiff, Pamela Peterson, and her mother, Lynette Peterson, in a medical malpractice case brought under the Federal Tort Claims Act, 28 USC §§ 2671 *et seq.* Please accept this letter as the plaintiff's submission in accordance with your letter order of July 1, 2006, requesting that each party submit, *ex parte,* a pre-settlement conference position paper for your consideration.

1. Facts.

Plaintiff asserts that at the trial of this matter her evidence will demonstrate the following:

a. Pamela Peterson is the 17-year-old daughter of a medically retired – and now deceased – Air Force officer. At a high school basketball practice, on or about January 15, 2003, Pamela suffered a tear of the meniscus in her right knee. Pamela was seen at the Ft. Meade medical clinic – a facility owned, operated and controlled by the defendant United States – and referred to Walter Reed Army Medical Center for further evaluation.

b. On January 16, 2003, Pamela was examined by Dr. (Lieutenant Colonel) Farrington Pearl, III, a board certified orthopedic surgeon. Dr. Pearl is member of the U.S. Army and during all of the times when he rendered care he was under the direction and control of the United States.

c. Upon examination, Dr. Pearl diagnosed that Pamela had suffered a "bucket handle" tear of the meniscus in her right knee. He informed both Pamela and her mother that the tear could be repaired by arthroscopic surgery. Dr. Pearl told Mrs. Peterson that the operation would last less than 2 hours and that Pamela would be discharged within 48 hours of the surgery. Additionally, Pamela asked Dr. Pearl whether the injury would impact her ability to play basketball. Dr. Pearl told Pamela that this injury could be repaired without difficulty and that she would be "back on the court long before the Terrapins needed her." (Dr. Pearl and Pamela had a lengthy discussion about the efforts that the University of Maryland and other schools had made to recruit her to play basketball.)

d. Dr. Pearl performed arthroscopic surgery upon Pamela at Walter Reed on January 18th. Neither the intraoperative anesthesia record nor the surgical note reveals any complication encountered during the surgery. None of the operating room personnel – all of whom have been deposed – note any complication was encountered.

e. In the immediate post-operative period, Pamela complained of excruciating pain in her right calf. Her mother testified that Pamela complained repeatedly to her and to Nurse Farris about the pain. Nurse Farris provided additional pain medication, but did not undertake any examination of Pamela. Fours hours post-operatively, and after Nurse Farris rotated off of the post-operative floor, the nurses caring for Pamela were unable to detect a pedal pulse in her right foot.

f. Pamela was, thereafter, examined by both Dr. Pearl and other members of the surgical team. Dr. Pearl diagnosed compartment syndrome and a resident surgeon, under Dr. Pearl's supervision, performed an emergency fasciotomy of Pamela's right calf. The fasciotomy consisted of several long incisions deep into the calf on both sides.

g. Pamela was also evaluated by a vascular surgeon who ordered vascular studies that revealed that her right femoral artery had been severed at about the level of her knee. Pamela was returned to the operating room and a vascular graft was obtained in order to repair the severed artery. Dr. (Major) Paul Flixon, a vascular surgeon, repaired the artery.

h. Despite the emergency repair, Pamela suffered a nerve injury in right leg. The injury causes a right foot drop which impairs her ability to walk without falling and prevents her from playing basketball or engaging in any sports which require her to run or jump. Plaintiff's expert witness, Dr. John Cardea, a board certified orthopedic surgeon, will testify that Pamela suffers a permanent, partial disability of her right leg. He will estimate her total disability at 25%.

i. The injury she sustained caused Pamela extreme pain, albeit for only a short period of time. It also left her with unsightly scars on both sides of her right calf.

j. Pamela is 17 years old and will turn 18 on September 9, 2005. She has been accepted for admission to the University of Maryland and Towson State College. Although prior to her injury Pamela had been recruited for a full athletic scholarship at various schools, including the University of Maryland, at the present, no scholarship offers have been made to her.

k. Dr. John Cardea, plaintiff's expert witness on the standard of care and causation, will testify that that the standard of care for arthroscopic surgery requires that no cutting should occur except where the physician has direct visualization of the cutting instruments. Further, since Dr. Pearl did not appreciate that the femoral artery had been severed at the time of surgery, it is apparent that he made a cut without visualizing the cutting instrument that caused the damage. Dr. Cardea will further testify that it was incomprehensible to him that Dr. Pearl did not identify the injury prior to concluding the surgery. He asserts that when Dr. Pearl released the tourniquet used on the patient's leg during the surgery, he should have observed blood in the operative field before terminating the surgery. Both the failure to note the injury prior to the conclusion of the surgery and severing the artery during the surgery constitute negligence. Finally, Dr. Cardea will testify that the injuries suffered by Pamela, including the emergency fasciotomy, the vascular surgery and the foot drop were proximately caused by the negligence of Dr. Pearl.

l. Dr. Paul Bixby, a board certified neurologist, will testify for the plaintiff. Dr. Bixby will assert that plaintiff's foot drop was caused by excessive blood that accumulated in the plaintiff's calf as a result of the severed artery. He will testify that plaintiff's foot drop is permanent and cannot be repaired by existing medical techniques.

m. As a result of her injury, Pamela's hospitalization was 15 days longer than would have otherwise been anticipated. Pamela missed about 30 days of school and required 6 months of intensive rehabilitation. The medical costs paid by Mrs. Peterson during Pamela's rehabilitation amount to just under $27,000.

2. Major Weaknesses – Factual and Legal

a. Plaintiff. Plaintiff's case on liability is strongest; her damages evidence is less so. The plaintiff has a permanent neurological injury. Nevertheless, her rehabilitation and adaptation has been mostly successful. She is presently able to walk, albeit with a slight limp. She will be precluded from most sports, but others, for example, swimming and cycling, are still

available to her. Plaintiff has claimed the loss of a scholarship offers for her athletic accomplishments. To be sure, no scholarship offers have presently been made to her. However, she is eligible for substantial need-based financial assistance and it is possible that she may be offered a full scholarship at Towson before the September term begins. Finally, although plaintiff has made a lost wage claim, she concedes that, perhaps with accommodations and possibly without, she may be able to perform many high-paying occupations, e.g. attorney, physician, etc.

b. Defendant. The finding of negligence by Dr. Pearl appears to be nearly certain. To be sure, defendant has identified an expert who will testify that the vessel might have either ruptured due to a pre-existing defect or been inadvertently injured in the early post-operative period. Neither of these possibilities is supported by medical literature and defendant's expert concedes that an intraoperative iatrogenic injury cannot be ruled out.

3. Evaluation of Damages.

A verdict in excess of $1,500,000 or a verdict less than $150,000 is unlikely.

4. Settlement negotiations.

Plaintiff made a demand for $2.5 million early in discovery. To date, the defendant has not made an offer.

5. Attorney's Fees and Cost of Litigation.

Plaintiff's anticipated costs for trial amount to approximately $50,000. These include expert fees, witness fees and related costs. This matter is being prosecuted on a contingent fee basis. Attorney's fees are limited by statute to 25%.

Thank you for your consideration of these matters.

Sincerely,

Margaret O. Steinbeck
Counsel for the Plaintiff

24TH FEDERAL LITIGATION COURSE

PRETRIAL PREPARATION

I. INTRODUCTION

This outline provides an overview of the types of matters that you must prepare and consider as you complete your final preparations before trial of a civil case, as well as some miscellaneous management considerations concerning sensitive exhibits during trial. It assumes that discovery has closed, and final dispositive motions have been considered and either denied or denied in part.

Whether you are lead counsel or second chair, consider the matters listed below and devise a clear, definitive division of labor between yourself and any co-counsel, and paralegal (if any). Assume that any matter that you do not explicitly delegate becomes your sole responsibility. Assume that no matter how well you set up your Pretrial checklist, you will miss something. Assume this outline has missed (more than) something.

This checklist is a model or template. It is based primarily on Local Rules of the Federal District Court, Middle District of Florida. It will not fit your case perfectly.

II. REFERENCES

A. Imwinkelried, Edward J. *Evidentiary Foundations* (LEXIS-NEXUS Law Publishing, 5th ed. 2002; web site: http://www.bookstore.lexus.com).

B. Koeltl, John G. and Kiernan, John S., *The Litigation Manual* (Section of Litigation, American Bar Association, 3d ed. 1999).
(Publications Planning and Marketing, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611)

C. Lubet, Steven. *Modern Trial Advocacy* (NITA, 2 ed. 1999).
(National Institute for Trial Advocacy, Notre Dame Law School, Notre Dame, Indiana 46556; phone (800) 225-6482; web site: http://www.nd.edu/~nita)

D. Mauet, Thomas A. *Pretrial* (Aspen Publishers, Inc. 5th ed. 2002).
(Little, Brown: phone (800) 950-5259; web site:
http://search.barnesandnoble.com/textbooks/booksearch)

E. Mauet, Thomas A. *Trial Techniques* (Aspen Publishers, Inc., 6th ed. 2002).
(Little, Brown: phone (800) 950-5259; web site:
http://search.barnesandnoble.com/textbooks/booksearch)

F. McElhaney, James W. *McElhaney's Trial Notebook* (Section of Litigation,

American Bar Association, 3rd ed. 1994).
(Publications Planning and Marketing, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611)

G. Federal Rules of Evidence Summary Trial Guide (Elex Publishers, 5 Crescent Place South, St. Petersburg, Florida 33711; phone (800)546-ELEX; web site: http://www.elexpublishers.com)

III. OPERATIVE CONSIDERATIONS

A. Clear communication among counsel and paralegals.

B. Identify and refer to orders or other papers governing the case.

1. Case Management Orders.

2. Stipulations between parties.

3. Local Rules of Court.

C. Identify and prioritize tasks, assets (materiel and personnel), time/suspense dates, locations and logistical considerations.

D. Explicit division of labor.

IV. PRETRIAL STATEMENTS

A. Contents are generally dictated by Local Rules of Court, and preparation of Pretrial Statements is frequently preceded and largely formed by a "Pre" Final Pretrial Conference.

B. "Pre" Final Pretrial Conferences – typical agenda:

1. Discussion of the possibility of settlement (requires coordination with responsible DOJ or agency officers having authority to settle to be available [at least telephonically]).

2. Stipulation to as many facts or issues as possible.

3. Examination of all exhibits or substitutes of exhibits (photographs, usually), and other items of tangible evidence to be offered by any party at trial.

4. Exchange of the names and addresses of all witnesses.

5. Preparation of Pretrial Statements in accordance with FLRs.

C. Contents of a typical Pretrial Statement:

1. The basis of Federal jurisdiction.

2. A concise statement of the action.

3. A brief, general statement of each party's case.

4. An Exhibit List of matters to be offered into evidence at trial. The Exhibit list will include a descriptive notation sufficient to identify each exhibit, and a notation of objections as to specified exhibits, see Marking and Listing Exhibits, below.

5. A Witness List of persons who may be called at trial.

6. An Expert Witness List which includes a statement of the subject matter and summary of the substance of expected testimony pursuant to Fed.R.Civ.P. 26(e)(1) and (3).

7. In cases involving monetary damages, a statement of the elements of a claim and the amount being sought for each element thereof.

8. A list of all depositions to be offered in evidence at trial (as distinguished from possible use for impeachment), including designations of page/line numbers to be offered from each deposition.

9. A concise statement of those facts which are admitted and will require no proof at trial, together with any reservations directed to such admissions.

10. A concise statement of applicable principles of law on which there is agreement.

11. A concise statement of those facts which remain to be litigated (without incorporation by reference to prior pleadings or memoranda, i.e., you need to lay it out briefly in this statement).

12. A concise statement of those issues of law which remain for determination by the court (without incorporation by reference to prior pleadings or memoranda, i.e., you need to lay it out briefly in this statement).

13. A concise statement of any disagreements as to the application of the Federal Rules of Civil Procedure or the Federal Rules of Evidence.

14. A list of all motions or other matters which require action by the

court.

V. MARKING AND LISTING TRIAL EXHIBITS

A. "The Meet-and-Mark." Purpose is to examine, review, label, record objections to / stipulations concerning all exhibits offered at trial.

B. When and where it happens; procedures.

C. Preparation of the Exhibit List after the Meet-and-Mark, contents, see Pretrial Statement, above.

VI. LOGISTICAL REQUIREMENTS, CONSIDERATIONS, PREPARATION

A. Long distance travel, witness transportation, lodging, and reimbursement.

B. Final fact-witness preparation.

C. Final expert-witness preparation.

VII. MISCELLANEOUS TRIAL MANAGEMENT CONSIDERATIONS

A. Management of sensitive exhibits.

1. Defined – things like drugs, weapons, currency, classified documents, articles of high value, and other similar matters. When offering sensitive exhibits and exhibits other than documents into evidence, courts generally require that the party also offer a photograph of the exhibit.

2. Typical requirements imposed by the courts -- At the conclusion of each daily proceeding, when the court recesses, be prepared to receive back from the clerk or courtroom deputy all sensitive exhibits for safe-keeping until the next session of court. The party offering the exhibit is responsible for its maintenance, custody, and integrity during the recess. Be prepared to coordinate such matters as secure facilities, cabinets, safes, or other containers with other Executive agencies close to the location of the courthouse. After the completion of the trial, the clerk or courtroom deputy will return sensitive exhibits to the proponent party (who will have substituted a photograph into the record. The proponent party is responsible for maintenance, custody, and integrity of the exhibit during the time permitted for appeal and the pendency of appeal (if one is taken).

B. Oversized exhibits.

1. Defined – any document or other exhibit larger than the dimensions of a piece of legal paper (8-1/2" x 14").

2. Typical requirements imposed by the courts -- generally must be photographed and that photograph, however mounted, cannot exceed the dimensions of a standard piece of bond paper (8-1/2" x 11"). After the completion of the trial, the clerk or courtroom deputy will return oversized documents and exhibits to the proponent party (who will have substituted a photograph into the record. The proponent party is responsible for maintenance, custody, and integrity of the exhibit during the time permitted for appeal and the pendency of appeal (if one is taken).

VIII. CONCLUSION

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24TH FEDERAL LITIGATION COURSE

Evidentiary Objections

I. OBJECTIONS: BASIC REQUIREMENTS.

A. A timely objection is required. Rule 103, Federal Rules of Evidence (FRE).

1. The objection must be made as soon as the grounds reasonably appear. Errors in admitting evidence at trial are usually waived on appeal unless a proper, timely objection was made during the trial. FRE 103.

2. Once the court makes a definite ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error an appeal. 2000 Amendment to FRE 103(a).

3. At depositions, objections to the form of the questions or answers, are waived unless timely made at the deposition. Fed. R. Civ. P. 32. Other evidentiary objections (competency, relevancy, materiality, etc.) are not waived at deposition. Fed. R. Civ. P. 32.

B. If the objection is to the form of a question, the objection should be made before the answer is given, if practicable.

C. If the objection is to the answer, a motion to strike the answer should accompany the objection.

D. The grounds (legal basis) for the objection should always be stated, as succinctly as possible. FRE 103. For example, "Objection. Hearsay." Or, "Objection, calls for speculation."

E. "Speaking" objections, or objections that include excessive argument, are improper in the presence of the jury. FRE 103(c). If further argument is needed, counsel should request to approach at side-bar. "Speaking" objections are improper at deposition if the objection is designed to coach the witness or otherwise impede the orderly conduct of the deposition.

F. While it is unethical to make an unfounded objection solely to disrupt your opponent, it is proper to make an objection whenever there is a legitimate evidentiary basis for it.

G. However, it is usually unwise to object to every objectionable question or answer.

II. OBJECTIONS TO THE FORM OF THE QUESTION (OR ANSWER).[1]

A. **Leading** (on direct examination). FRE 611(c).

1. A "leading question" is one which suggests or contains its own answer.

2. Objectionable on direct examination. Permitted on cross-examination or when questioning a hostile witness. See FRE 611.

3. Allowed if preliminary, foundational, directing the witness's attention or refreshing the witness's recollection.

B. **Compound**. FRE 611 (a).

1. A "compound question" contains two separate inquiries that are not susceptible to a single answer.

2. Dual inquiries are permissible if the question seeks to establish a relationship between two facts or events. For example, "Did he roll forward and then put on his blinking lights?"

C. **Vague/Ambiguous**. FRE 611(a).

1. A "vague question" is incomprehensible, incomplete, or calls for an ambiguous answer. For example, the question, "Were you on duty?" is vague, since it does not specify a time period.

2. Unless the precise wording is important, it is often desirable to simply rephrase when your opponent objects to a vague question.

[1] Adapted from Steven Lubert, Modern Trial Advocacy: Analysis and Practice, Chapter 7 (NITA, 1993).

D. **Argumentative**. FRE 611(a).

1. An "argumentative question" asks the witness to accept the examiner's summary, inference or conclusion, rather than to agree or disagree with the existence (or non-existence) of a fact. Alternatively, an "argumentative" objection may be made when the examiner is excessively quibbling with the witness.

2. In response to an "argumentative" objection, the examiner may want to explain the question's relevance, or the non-argumentative point the examiner is trying to make.

E. **Narrative**. FRE 611(a).

1. A "narrative question" is one which calls for a narrative answer.

2. A "narrative answer" is one which proceeds at some length in the absence of questions.

3. Objections can be made to both narrative questions and narrative answers.

4. Expert witnesses are often allowed to testify in a narrative fashion. However, it is usually more persuasive to interject questions to break up lengthy answers.

F. **Asked and Answered**. FRE 611(a).

1. Once an inquiry has been "asked and answered" further inquiry is objectionable. Variation on a theme is permissible, so long as the identical information is not endlessly repeated.

2. The "asked and answered" rule does not preclude inquiring on cross examination into subjects that were covered fully on direct. Nor does it prevent asking identical questions of different witnesses.

G. **Assumes Facts Not in Evidence**. FRE 611(a).

1. A question, usually on cross examination, is objectionable if it includes as a predicate a statement of fact that has not been proven. Such questions include an unproved assumption. For example, the question "Isn't it true that you left your home so late you only had fifteen minutes to get to your office?" may be objectionable if the time of the witness's departure was not previously established. The witness cannot answer yes to the main question (15 minutes to get to the office) without implicitly conceding the unproved predicate.

2. Simple, one part cross examination questions do not need to be based on facts that are already in evidence. For example, it would be proper to ask a witness, "Didn't you leave home late that morning?," whether or not there had already been evidence as to the time of the witness's departure.

H. **Non-responsive Answers**. FRE 611(a).

1. The objection is especially applicable to a voluntary response by a hostile witness.

2. Some judges take the view that only the attorney asking the question can object to a "non-responsive" answer.

3. The modern view is that opposing counsel can object if all, or some part, of a witness's answer is non-responsive, even when the objecting counsel is not the examiner, because counsel is entitled to insist that the examination proceed in question and answer format, to allow for appropriate objections to inadmissible evidence.

I. **Misquoting Witness (or Misstating Evidence)**. FRE 611(a).

1. Counsel's question misstates prior testimony of witness or misstates prior evidence.

2. Similar to objection based on assuming a fact not in evidence.

J. **Counsel Testifying**. FRE 602, 603. Opposing counsel is making a statement instead of asking a question.

K. **Beyond the Scope (of Direct Examination, Cross Examination, etc.)**. Question is unrelated to preceding examination by opposing counsel. Remember, credibility is always "within the scope."

L. **Speculation**. FRE 602, 701.

1. A question which calls for conjecture, speculation or judgment of veracity is objectionable under Rules 602 (personal knowledge required) and 701 (lay witness opinion limited to opinions based on perception and helpful to understanding, such as distance, speed, intoxication, etc.).

2. This is technically a "substantive objection," but some may also consider it a "form" objection, which may be waived if not made at a deposition. See Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 147 n.8 (D.Md. 1997).

M. **Opinion**. FRE 701, 702.

1. A question is objectionable if it calls for an opinion by a witness not qualified to give one.

2. Lay witness opinion testimony may not be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." 2000 Amendment to FRE 701.

3. This is technically a "substantive objection," going to the competency of the witness, but some may also consider it a "form" objection, which may be waived if not made at a deposition. See Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 147 n.8 (D.Md. 1997).

III. SUBSTANTIVE OBJECTIONS.[2]

A. **Hearsay**. FRE 801-804.

1. "Hearsay" is a statement, other than by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c). Thus, any out-of-court statement, including the witness's own previous statement, is potentially hearsay.

2. Non-hearsay. FRE 801.

   a. A statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted. FRE 801(c).

   b. The witness's own previous statement is not hearsay if (1) it was given under oath at a trial, hearing or other proceeding, or at a deposition, and is inconsistent with the witness's trial testimony; or (2) it is consistent with the current testimony and is offered to rebut a charge of recent fabrication; or (3) is a statement of past identification. FRE 801(d)(1).

   c. Admission by a party-opponent. Must be offered against a party. FRE 801(d)(2).

3. Common hearsay exceptions (availability of declarant immaterial). FRE 803.

   a. Present sense impression. Statement describing an event while the person was observing it.

   b. Excited utterance. Statement relating to a startling event, while under the stress of excitement caused by the event.

   c. State of mind. A statement of the declarant's mental state or condition.

   d. Past recollection recorded. Memorandum or record about which the witness once had knowledge, but which she has since forgotten. The record must have been made when the events were fresh in the witness's mind and must have been accurate when made.

[2] Adapted from Steven Lubert, Modern Trial Advocacy: Analysis and Practice, Chapter 7 (NITA, 1993).

e. Business records. Records of regularly conducted business activity – made at or near the time of the transaction, by a person with knowledge, or transmitted from a person with knowledge. The foundation for the record must be laid by the custodian of the record, by some other qualified witness, or by Rule 902(11) or (12) or other statutory certification.

The 2000 Amendment to FRE 902 sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, through use of an affidavit or declaration. Advance written notice of intent to offer a record into evidence under Rule 902 is required.

f. Reputation as to character. Evidence of a person's reputation for truth and veracity. (Note there are restrictions other than hearsay on the admissibility of character evidence.)

4. Common hearsay exceptions (declarant must be unavailable). FRE 804.

a. Dying declaration. A statement by a dying person as to the cause or circumstances of what he or she believed to be impending death.

b. Statement against interest. A statement contrary to the declarant's pecuniary, proprietary, or penal interest at the time of making.

c. Former testimony. Testimony given at a different proceeding, or in a deposition, if the testimony was given under oath and the adverse party had an opportunity to cross examine the witness.

B. **Irrelevant**. FRE 402. Would not tend to make any fact that is of consequence more probable or less probable. Motion to strike may be appropriate.

C. **Unfair Prejudice**. FRE 403. The probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

D. **Improper Character Evidence**.

1. Character evidence is generally not admissible to prove that a person acted in conformity with his or her character. May be offered to show motive, opportunity, intent, plan, knowledge, identity, absence of mistake, etc. FRE 404.

2. The credibility of a witness who takes the stand and testifies may be impeached on the basis of a prior criminal conviction, but only if the crime was a felony or one which involved dishonesty or false statement. With certain exceptions, the conviction must have occurred within the last ten years. FRE 609.

3. A witness may be cross-examined concerning prior bad acts only if they reflect upon truthfulness or untruthfulness. Extrinsic evidence of such bad acts is not admissible. The Rule was amended in 2003 to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attach or support the witness' character for truthfulness, and does exclude extrinsic evidence offered for other grounds of impeachment. FRE 608.

4. Reputation evidence is admissible only with regard to an individual's character for truthfulness or untruthfulness. Evidence of truthful character is admissible only after the character of a witness has been attacked. FRE 608.

E. **Lack of Personal Knowledge**. FRE 602. A witness may not testify unless personal knowledge shown (with the exception of experts).

F. **Improper Opinion**. FRE 701, 702.

1. Lay witnesses are generally precluded from testifying as to opinions, conclusions, or inferences. FRE 701.

2. Expert witnesses must be qualified by knowledge, skill, experience, training, or education to offer opinion testimony. FRE 702.

G. **Speculation**. See above.

H. **Authentication Lacking**. FRE 901(a). Proof must be offered that the exhibit is in fact what it is claimed to be.

I. **Best Evidence Rule**. FRE 1002. If it applies, original document must be offered or its absence accounted for. If the contents of a document are to be proved, the rule usually applies.

J. **Foundation Lacking**. FRE 602; 901(a). Nearly all evidence, other than a witness's direct observation of events, requires some sort of predicate foundation for admissibility. This objection is appropriately interposed if there is a lack of authentication for the proffered evidence, or if the proponent has failed to lay the proper predicate for the testimony or exhibit.

K. **Privileged**. FRE 501. Answer would violate a valid privilege.

L. **"Calls for Inadmissible Evidence" (Liability Insurance)**. FRE 411. Evidence that a person carried liability insurance is not admissible on the issue of negligence.

M. **"Calls for Inadmissible Evidence" (Subsequent Remedial Measures)**. FRE 405. Evidence of subsequent repair or other remedial measures is not admissible to prove negligence or other culpable conduct.

N. **"Calls for Inadmissible Evidence" (Settlement Offers)**. FRE 408. Offers of compromise or settlement are not admissible to prove or disprove liability. Statements made during settlement negotiations are also inadmissible.

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FACULTY & GUEST SPEAKERS

HONORABLE WILLIAM CONNELLY

William Connelly was appointed a full time United States Magistrate Judge for the District of Maryland in March 1995. Prior to his appointment, he was in private practice for 14 years handling general civil and criminal litigation. Judge Connelly was commissioned in the U.S. Air Force in 1973. He entered active duty in 1977 and served four years in the Judge Advocate General's Department. Since 1981 he has served in the U.S. Air Force Reserve. He served in the Appellate Defense Office for four years and the General Counsel's Office at the Defense Intelligence Agency for five years. For the past twelve years he has been a Reserve Judge on the Air Force Court of Criminal Appeals. He holds the rank of Lieutenant Colonel. Judge Connelly received his B.A. and J.D. from the University of Maryland in 1973 and 1976. He continued his education at Georgetown Law School obtaining his LL.M. in 1979. He is a member of the Maryland and District of Columbia Bars. He is a frequent lecturer at CLE and Bar programs on federal practice and professionalism.

PAUL BROWN

Paul grew up in Atlanta and earned a Bachelor of Arts degree in history with highest honors from Georgia State University. Before attending law school he worked as a reporter and producer at an all-news radio station. Paul left the news business to join the staff of U.S. Senator Mack Mattingly in Washington, where he served for three years as the senator's deputy press secretary. Paul attended law school at the University of Georgia and graduated in 1988 with honors. Following graduation, he joined the Department of Justice through the Attorney General's Honors Program. For the past 16 years, Paul has been assigned to the Constitutional Torts Staff in the Civil Division, where he specializes in all types of personal-liability litigation involving federal employees. During this time he has developed an expertise in the process used by Department attorneys to decide whether to authorize individual-capacity representation in a given case. He is also knowledgeable about litigation strategy and the available legal defenses such as absolute immunity, qualified immunity, and the immunity available to federal employees under the *Westfall* Act. In addition to his practice in both the district courts and the courts of appeals, Paul serves as a point of contact for Assistant U.S. Attorneys nationwide who need guidance and support with their personal-liability cases. He has written a monograph on certain aspects of his legal specialty, and he organizes seminars for DOJ attorneys at the National Advocacy Center. Paul is a frequent guest instructor at the Federal Law Enforcement Training Center and the Inspector General Academy. He also gives briefings to numerous groups of federal employees throughout the executive branch.

MICHAEL ROBINSON

In 1976 Mr. Robinson received his J.D. from Yale Law School. After clerking on the district court in the Southern District of New York, Mr. Robinson went to practice in the law firm of Sutherland, Asbill and Brennan in Washington, D.C. In 1981 he joined the Department of Justice where he worked in the Office of Legal Policy until he moved to the Appellate Staff of the Civil Division in 1986. Mr. Robinson lectures on the Equal Access to Justice Act and

frequently serves as a judge and lecturer on appellate advocacy for the Attorney General's Advocacy Institute.

ANNE MURPHY

After graduating with a First Class degree in philosophy from the University of Cambridge, England, and post-graduate work in philosophy at Harvard, Ms. Murphy received her law degree from the University Of Baltimore School Of Law in 1994. After clerking on the Court of Appeals of Maryland and the United States District Court for the District of Maryland, Ms. Murphy joined the Department of Justice in 1996. She has been a member of the Appellate Staff of the Civil Division ever since. Ms. Murphy frequently serves as a faculty member for appellate advocacy courses held at the National Advocacy Center in Columbia, South Carolina. She also teaches appellate advocacy at the University of Baltimore School of Law, and Legal Issues in Medicine for an MBA program at the Johns Hopkins University.

LIEUTENANT COLONEL (RETIRED) DOUG MICKLE

Lieutenant Colonel (Retired) Doug Mickle is a trial attorney with the National Courts Section of the Commercial Litigation Branch, United States Department of Justice. LTC (Ret.) Mickle was a Distinguished Military Graduate of St. Lawrence University and upon graduation in 1982, was commissioned in the Regular Army. He was initially branched in the Adjutant General's Corps where he served for over five years. During that time he served in Europe as a company Executive Officer; commanded the 198th Personnel Service Company, Boeblingen Composite Team, 38th Personnel and Administration Battalion; and worked in Washington D.C. in The Adjutant General Directorate. In 1987, LTC (Ret.) Mickle was selected for the Funded Legal Education Program. He attended the George Washington University's National Law Center in Washington, D.C., graduating in 1990. As a Judge Advocate, LTC (Ret.) Mickle had several assignments that involved litigation, to include: Trial Counsel for the 194th Armored Brigade (Separate) and Chief of Military Justice at the United States Army Armor Center and Fort Knox; Litigation Attorney, Military Personnel Law Branch at the United States Army's Litigation Division in Washington, D.C.; Senior Litigation Attorney for the Litigation Division; and finally, as Chief of the General Litigation Branch at the Army's Litigation Division. As a litigation attorney, LTC (Ret.) Mickle worked upon several cases involving military personnel policy issues, to include: Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002)(en banc); Sebastian v. United States, 185 F.3d 1368 (Fed. Cir. 1999); Able v. United States, 155 F.3d 628 (2d Cir. 1998); Holley v. United States, 124 F.3d 1462 (Fed. Cir. 1997); and Perez v. United States, 156 F.3d 1366 (Fed. Cir. 1998). LTC (Ret.) Mickle also served as the Deputy Staff Judge Advocate for United States Army I Corps and Fort Lewis, at Fort Lewis Washington. LTC (Ret.) Mickle's military schooling includes the Adjutant General Officer's Basic and Advanced Courses; the Judge Advocate Officer's Basic and Graduate Courses; and the Command and General Staff College. His military awards include the Legion of Merit, Defense Meritorious Service Medal, the Meritorious Service Medal with Oak Leaf Clusters, the Army Commendation Medal, the Army Achievement Medal with Oak Leaf Cluster, and the Parachutist Badge. Mr. Mickle is a member of the bars of New York, Pennsylvania, the District of Columbia, Army Court of Criminal Appeals, Court of Appeals for the Armed Forces, United States Court of Federal Claims and the U.S. Supreme Court.

LIEUTENANT COLONEL (RETIRED) THOMAS M. RAY

Lieutenant Colonel (Retired) Thomas M. Ray is currently assigned as a senior attorney in the Civilian Personnel Litigation Branch, U. S. Army Litigation Division, in Arlington, Virginia. He has been in this position since his retirement from active duty in February 2005. In December 1985, LTC (Ret.) Ray reported for his first assignment to the 9th Infantry Division at Fort Lewis, Washington, where he became a prosecuting attorney. In 1988, he deployed for six months to the Sinai, Egypt for duty as the Task Force Judge Advocate, with the Multinational Forces and Observes Peacekeeping Group. Upon his return to Fort Lewis, he became the Division's first Chief of Operational Law. In May of 1989, he arrived in South Korea and served one year as a trial defense counsel at 2nd Infantry Division, Camp Casey. From Korea, LTC (Ret.) Ray transferred to Frankfurt, Germany, where he was the Senior Defense Counsel from 1990-1993. In this position he was in charge of the largest Field Office within TDS. He supervised nine attorneys spread over six offices and provided support for three different general courts-martial jurisdictions (V Corps, 3rd Armored Division, and 32nd Air Defense Command). During the Gulf War, LTC (Ret.) Ray deployed to Israel to provide legal support for the Patriot Missile units. In 1994, he first went to the Civilian Personnel Branch of the Army's Litigation Division, located in Arlington, Virginia. He served in that position for three years. In 1999, he was assigned as a Special Assistant United States Attorney to the Eastern District of Virginia (Civil Division) for two years. In 1999, he became the Regional Defense Counsel in Seoul, Korea. In June 2001 he returned to the Department of Justice, this time working in the U.S. Attorney's Office (Civil Division) in Washington D.C. In July 2002, he became the Chief of the Tort Litigation Branch responsible for the defense of all Army tort litigation filed in Federal Courts throughout the United States. In July 2004, he was reassigned to be the Executive Officer for the U.S. Army Trial Defense Service until his retirement in 2005. LTC (Ret.) Ray's awards and honors include: the Legion of Merit, seven Meritorious Service Medals, a 1999 Department of Justice Award for Superior Service, numerous public speaking awards, service as a Lyndon Baines Johnson Congressional Intern in 1984, and a Louisiana Commendation Medal (1980). LTC (Ret.) Ray earned his Bachelor of Arts Degree in political science from Louisiana State University at Shreveport in 1982. He received his Doctor of Jurisprudence Degree from Mississippi College in 1985. In 1994, he was received a Masters of Law Degree at the Army Judge Advocate General's School in Charlottesville, Virginia. LTC (Ret.) Ray and his wife Mi Ran have two children. William is fifteen and Catherine is thirteen.

LIEUTENANT COLONEL MARGARET O. STEINBECK

Circuit Judge, 20th Judicial Circuit, State of Florida. B.S. (summa cum laude), University of Georgia, 1978; J.D., University of Virginia School of Law, 1984; LL.M. (with honors), The Judge Advocate General's School, U.S. Army, 1989. Lieutenant Colonel Steinbeck served on active duty in the Army JAG Corps from 1984 through 1990, with assignments in Germany and Washington, D.C. As an attorney in the Environmental Law Division, U.S. Army Legal Services Agency, Lieutenant Colonel Steinbeck represented the U.S. Army in a variety of civil litigation actions, including environmental clean-up, water rights, and toxic tort litigation. From 1990 to 1995, Lieutenant Colonel Steinbeck was in private practice with firms in Washington, D.C., and Naples, Florida. In 1995, Lieutenant Colonel Steinbeck was appointed as an Assistant United States Attorney (AUSA) for the Middle District of Florida, where she represented the United

States and its agencies and officers in both affirmative and defensive civil litigation, including employment discrimination, personal injury, medical malpractice, constitutional tort, health care fraud, and condemnation actions. In 1998, Lieutenant Colonel Steinbeck was appointed as a Circuit Judge for the 20th Judicial Circuit, State of Florida. As a Circuit Judge, she presides over circuit civil and felony criminal trials and sits as an appellate judge for civil and criminal appeals from county court. Lieutenant Colonel Steinbeck is a member of the bars of Virginia and Florida and is a former Chair of the Military Affairs Committee of the Florida Bar. She is on the faculty of the Florida Judicial College and co-author of *The Florida Evidence Code Trial Book*. She is also a faculty member of the Florida College of Advanced Judicial Studies. Lieutenant Colonel Steinbeck is currently assigned to the 174th Legal Support Organization, Miami, Florida.

LIEUTENANT COLONEL JOSEPH C. FETTERMAN

Chief, Military Personnel Branch, U.S. Army Litigation Division. B.S. (summa cum laude), University of Scranton, 1986; J.D., Cornell University Law School, 1989; LL.M., The Judge Advocate General's School, U.S. Army, 1998; LL.M. (With Highest Honors), George Washington Law School (2003). Trial Counsel, 9th Infantry Division and 199th Infantry Brigade & Chief, International & Operational Law, I Corps, Fort Lewis, Washington, 1990-1993. Associate Judge Advocate, United States Army Audit Agency, Alexandria, VA, 1993-1995. Legal Advisor, United States Department of State, Washington DC, 1995-1997. Command Judge Advocate, ARCENT-Saudi Arabia, 1997-1998. Litigation Attorney, USALSA Litigation Division, Military Personnel Branch, 1999-2002. Joint Contracting Center Counsel, US Army Contracting Command Europe, Camp Bondsteel, Kosovo, 2003-2004. Team Chief, Trial Team 1, USALSA Contract Appeals Division, 2004-2005. Member of the Bars of New York, the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, the Court of Federal Claims, the DC Circuit, the Federal Circuit, and the United States Supreme Court.

LIEUTENANT COLONEL JOHN M. BERGEN

Law Clerk, Judge Lawrence M. Baskir, U.S. Court of Federal Claims; Senior Trial Counsel, 10th Legal Support Organization, Upper Marlboro, MD, 2000-04. B.A., Lafayette College, 1988; J.D., American University, Washington College of Law, 1991; 127th Judge Advocate Officer Basic Course, 1992; Judge Advocate Officer Advanced Course, 2003. Law Clerk, Chief Judge Eugene R. Sullivan, U.S. Court of Appeals for the Armed Forces, 1991-92; Trial Counsel, 24th Infantry Division, Fort Stewart, GA, 1992-94; Defense Counsel, Hunter Army Airfield Field Office, Savannah, GA, U.S. Army Trial Defense Service, 1994-96; Appellate Attorney, Government Appellate Division, U.S. Army Legal Services Agency, Falls Church, VA, 1996-97; Litigation Attorney, U.S. Army Litigation Center, Arlington, VA, 1997-99. Member of the bars of Pennsylvania, Connecticut, District of Columbia, Army Court of Criminal Appeals, Court of Appeals for the Armed Forces, U.S. Court of Federal Claims and the U.S. Supreme Court.

MAJOR CHARLIE YOUNG

Major Charlie Young currently serves as the Chief of the Litigation and Employment Law Section, Office of General Counsel, National Guard Bureau (NGB). Maj Young was originally commissioned in the United States Army in 1989 and served as an active-duty Army officer until

April 2005 when transferred to the West Virginia Air National Guard (WVANG) and accepted a T-10 Active Duty position at NGB. Maj Young was recently promoted to Lieutenant Colonel in the WVANG and is awaiting federal recognition of his WVANG promotion. Since starting at NGB in April 05, Maj Young has served as a litigation attorney, deployed to New Orleans for Hurricane Katrina relief duties, deployed to Iraq to work Rule of Law issues for Multi-National Forces-Iraq, and assisted in the deployment of 6,000 NG soldiers to the Nation's South-West border for participation in Operation Jump Start. From Jun 02 until Apr 05, he was assigned to the Tort Litigation Branch of the Army's Litigation Division, in Arlington, Virginia, where he tried many cases in various Federal District Courts around the nation. He attended the 50th Graduate Course at the Army Judge Advocate General's School in Charlottesville, Virginia, from Aug 01-May 02 where he received a Masters of Law Degree in Military Law. From Jan 98 until Jul 01, he was assigned to Germany with duty in the 1st Infantry Division. While assigned to the Big Red One, he served as a Legal Assistance Attorney, Trial Counsel for two aviation brigades, and as the Division's Senior Trial Counsel. During this assignment he tried over 120 contested criminal cases. MAJ Young attended the 144th Judge Advocate Officer Basic Course in Charlottesville, VA in 1997. From Jun 94-May 97, he attended the William and Mary School of Law in Williamsburg, VA under the Army's Funded Legal Education Program. Prior to law school, Maj Young was assigned as an Apache Attack Helicopter Platoon Leader, with B Company, 1-229th ATKHB, at Ft. Hood, TX and Ft. Bragg, N.C, from 1991-1994. He also served as the Attack Helicopter Battalion Intelligence Officer for the same battalion during this assignment. In Sep 89, he reported for his first assignment which included, the Aviation Officer's Basic Course, Flight School, Advanced Aero Scout Training, and the Apache Helicopter Qualification Course, at Fort Rucker, Alabama. His qualifications, awards, and honors include: The Army Aviator's Badge, Air Assault Badge, Airborne Badge, French Parachutist's Badge, Marine Corp's Parachutist's Badge, two Meritorious Service Medal, an Army Commendation Medal, an Air Force Achievement Medal, three Army Achievement Medals, Two National Defense Service Medals, the Iraq Campaign Medal, the Global War on Terrorism Service Medal, the Armed Forces Service Medal, the Humanitarian Service Medal, and the Association of Trial Lawyers of America's Outstanding Trial Advocacy Award. Maj Young earned his Bachelor of Science Degree in Economics from Vanderbilt University in 1989; his Master of Arts Degree in Management from Webster University in 1994; and his Doctor of Jurisprudence Degree from the William and Mary School of Law in 1997. He received his L.L.M. in Military Law from the U.S. Army Judge Advocate General's School in 2002 and completed the U.S. Army Command and General Staff College in 2005. He and his wife, Laurie, have three children; Madison (11), Darby (8) and Charlie (7).

MAJOR LOUIS A. BIRDSONG

JA, Professor, Administrative and Civil Law Department. Basic and Advanced Individual Training (Honor Graduate), 1988; B.A., Southwest Texas State University (Summa Cum Laude), 1991; Aviation Officer Basic Course, 1992 (Commandant's List); Air Assault School, 1992; Initial Entry Rotor Wing Course, 1992; Scout Platoon Leader's Course, 1993; J.D., The William and Mary School of Law, 1998; 147th Judge Advocate Officer Basic Course, 1998; Combined Arms and Services Staff School, 2002; LL.M., 51st Judge Advocate Officer Graduate Course (Commandant's List), 2003; United States Army Command and General Staff College, 2005. Platoon Leader, 6th Cavalry Brigade, Fort Hood, Texas, 1993-1994. S4, 6th Cavalry Brigade,

Fort Hood, Texas, 1994-1995. Chief, International and Operational Law, 2d Infantry Division, Camp Red Cloud, Republic of Korea, 1998-1999; Chief, Claims, 3d Infantry Division, Fort Stewart, Georgia, 2000; Chief, Administrative Law, 3d Infantry Division, Fort Stewart, Georgia, 2000-2001; Trial Counsel, 3d Infantry Division, Fort Stewart, Georgia, 2001-2002. Litigation Attorney, United States Army Litigation Division, United States Army Legal Services Agency, Arlington, Virginia, 2003-2006. Member of the Bars of Virginia and the United States Court of Appeals for the Armed Forces.

CAPTAIN LARRY P. COTE

Trial Attorney, Civil Division, U.S. Department of Justice, Jan. 2003 - present; Associate General Counsel, Executive Office for Immigration Review, U.S. Department of Justice, Mar. 2000 - Jan. 2003; Ethics Advisor, Office of Counsel to the President, Executive Office of the President of the United States, Nov. 2001 - May 2002 (detail); Special Assistant United States Attorney, U.S. Attorney's Office, District of Columbia, Sep. 2000 - Feb. 2001 (detail). B.A., Union College (NY), 1994; J.D., Albany Law School, 1997; Command Judge Advocate, Trial Counsel, 10th Legal Support Organization, Upper Marlboro, MD, Sep. 2000 - Jun. 2006; Administrative Law Attorney, Coalition Forces Land Component Command (Third Army), Camp Doha, Kuwait, Feb. 2003 - Dec. 2003. Member of the bars of Maryland, District of Columbia, U.S. Courts of Appeals for the Fourth, Fifth, Seventh and Ninth Circuits.